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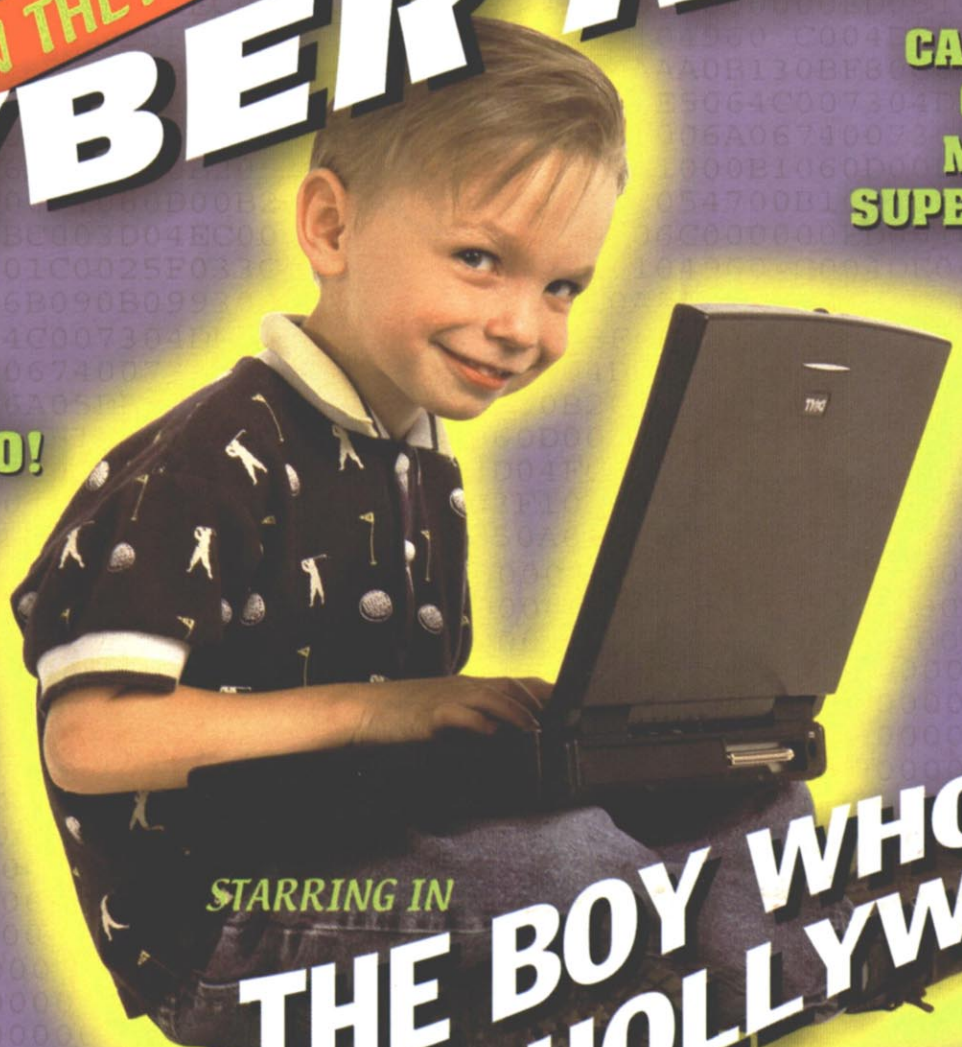

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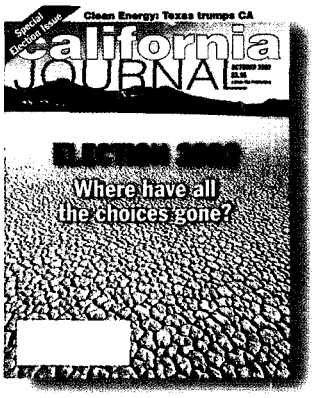

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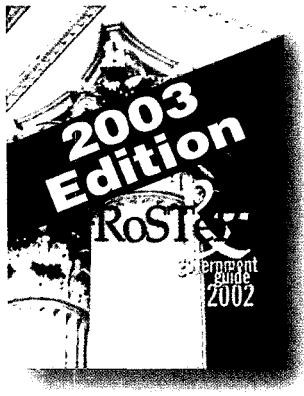

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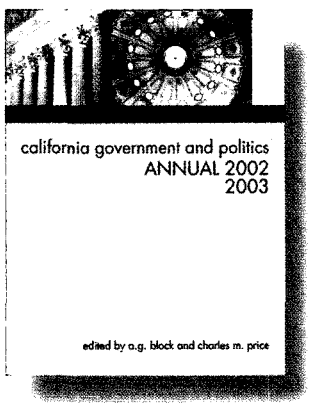

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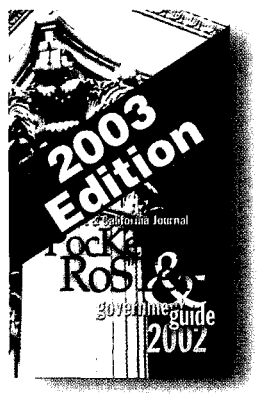

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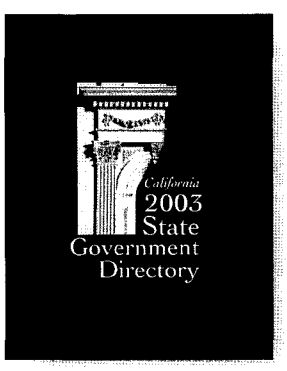

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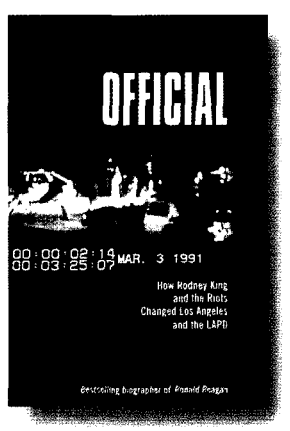

The Rodney King beating, the trial and its terrible aftermath form the core of this exhaustive study by longtime Washington Post reporter and columnist. *Hard cover, Random House, 698 pages, $15.95. paper.*

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California JOURNAL
November 2002
Volume XXXIII, Number 11

Upfront
Campaign money and sovereignty

Talking Points
Foreign-born parents survey

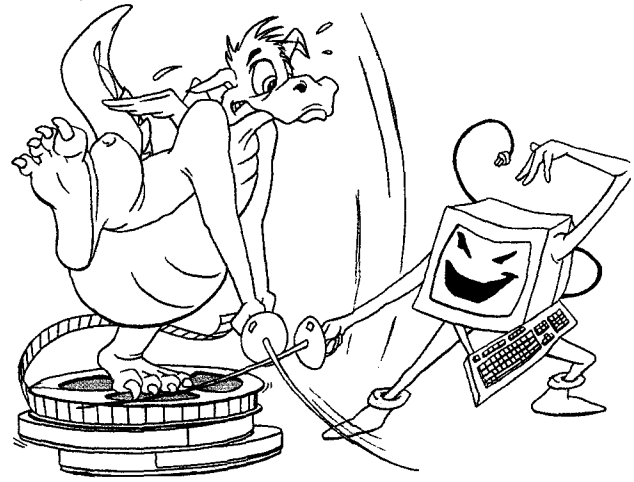
Southern Exposure
LA's new chief
By Sherry Bebitch Jeffe

D.C. Perspective
The island of Northern California
By Marc Sandalow

Good Question

Certainly we've all stopped to wonder about the pace of technological change. In a single decade, computers have wired the planet with new relationships and opportunities that will change the world forever. So it's not surprising that we face difficult questions about how to proceed. Our cover story, written from Washington by a pair of experts from *National Journal's TechnologyDaily*, is an excellent example. Intellectual property — whether it's books, movies, music or newspapers — was more easily regulated when it was contained on paper or film or vinyl. Now, the limitless ability to duplicate and distribute these products makes copyright regulation about as easy as putting a goldfish back in its shattered bowl. But without regulation, do artists and writers have to give away their work for free? Hollywood and Silicon Valley have forced this critical question to the table in Washington. Clearly, there's no easy answer. As one federal mediator put it: "There are no villains here."

y David Lesher

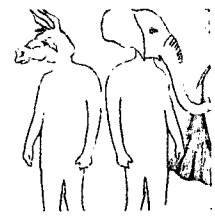


Digital Divide

Two of California's strongest economic engines — technology and entertainment — are facing off in a congressional showdown that has major consequences for both industries.
By Drew Clark and Bara Vaida. From the National Journal.

Cybertarians

In the last decade, these file-sharing, content-downloading computer literates have coalesced into a kind of free-floating political movement.
By Carl M Cannon. From the National Journal.



Party Animals

We Californians are independent mavericks by reputation. But the truth is that we are increasingly behaving as party loyalists when we enter the voting booth.
By Phil Trounstine

Three Strikes Review

The U.S. Supreme Court this month will consider the constitutionality of two petty theft cases that landed the criminals in jail for life under California's landmark three-strikes law.
By Dana Wilkie

Doctor Disclosure

A nine-year battle to make malpractice settlements available to medical consumers on the Internet was settled this year with a compromise bill.
By Stephen Robitaille

Cover by Dagmar Thompson

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umbrage

Cap'n Jack's Revenge. California's Native American tribes once again are claiming that they are sovereign nations and so don't have to obey the laws of California. The latest skirmish in this war is taking place at Fort FPPC, where the tribes say they are not bound by provisions of the 1974 Political Reform Act. The tribes are significant political players these days, thanks to the money they make — and contribute — from running casinos. The Agua Caliente Band of Cahuilla Indians, for instance, is one of the top moneybags in California, having doled out $13 million to state campaigns over the past four years. But the tribe has refused to comply with part of the reform act -— such as properly reporting some $7.5 million lavished on 135 candidates and initiatives during the 1998 elections. The tribe claims that federal law exempts it from filing. What to do? The Fair Political Practices Commission recently counterattacked, suing the tribe in state court to compel compliance. Good luck. It is doubtful that the state court has any enforcement authority over the tribe without federal intervention. As a result, the state suit is merely a small fight in a larger war, one ultimately to be decided by federal courts and the Congress: Can tribes that exist solely inside California pick and choose which California laws to obey? And if they truly are sovereign, are they even bound by provisions of the U.S. Constitution? Somewhere the old Modoc chief Cap'n Jack is enjoying a justifiable smirk.

The caretaker. Once upon a time, we looked to politicians for inspiration. Abraham Lincoln, Teddy Roosevelt, Franklin Roosevelt, John Kennedy and Ronald Reagan were among the presidents who inspired the American people to greatness. But apparently, Governor Gray Davis has a different standard. "Californians have entertainers, rock stars and athletes to entertain and inspire them," Davis said during the only face-to-face debate between he and his November rival, Republican Bill Simon. Political officeholders, he said, are expected simply "to get the job done." Nice. The governor thinks the people ought to be inspired to greatness by Tom Cruise and Barry Bonds.

Stand with me here ...

Former state Senator Leroy Greene died at the end of September. The Sacramento Democrat was 84 and had served in the Legislature for 36 years when he retired in 1998. During that time, Greene was known for his blunt approach and sometimes irascible demeanor. But Greene also was known as a champion of education, pushing hundreds of bills designed to improve the quality of education and the improvement of school buildings and grounds. As *The Sacramento Bee* reported, Greene carried an eclectic blend of legislation, including bills that prohibited the sale of previously frozen meat as fresh, a requirement to make government offices resistant to earthquakes and fires, legalized bingo and created an independent California Exposition and State Fair board of directors. In recognition for his years as chairman of both the Senate and Assembly education committees, a suburban Sacramento school was named for him. A large measure of Greene's clout came from his position as chairman of the state board that dispenses school construction funds. "Leroy Greene is an institution in Sacramento County," said Deborah Ortiz, the Sacramento Democratic lawmaker who replaced Greene in the Senate in 1998.

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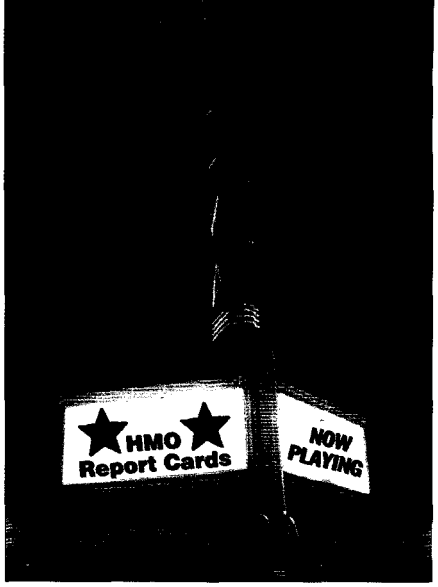
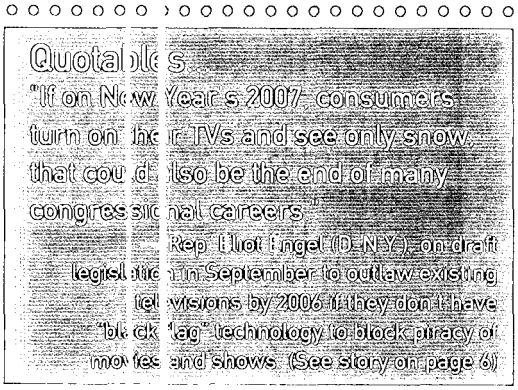
HMO Watch:

2nd annual report card



The state Department of Managed Health Care's second annual report card on HMOs said the organizations are doing better at immunizing children but they are doing poorly on mental health and sexually transmitted diseases. The HMO report card rates the state's top 10 health plans on a variety of criteria, including how easy it is to get care for an illness and how much hassle is involved in settling claims. In its statewide HMO review, the report gave out out only one three-star rating and that was to Kaiser Southern California for superior preventive care. When it came to getting treated for serious illness, only three plans — Kaiser North, Kaiser South and PacifiCare — got two stars (good rating), while the rest only rated fair or poor. The full report card, available at www.hmohelp.ca.gov, also rates HMOs on a regional basis. Daniel Zingale, director of Managed Care department, noted that the star ratings resemble movie reviews. "These are far more serious than movie reviews," he said. "You're not choosing whether to see the movie 'John Q.' You're maybe choosing whether to live it."


Quotable

"If on New Year's 2007 consumers turn on their TVs and see only snow, that could also be the end of many congressional careers.

Rep. Eliot Engel (D-N.Y.), on draft legislation in September to outlaw existing televisions by 2006 if they don't have "black flag" technology to block piracy of movies and shows. (See story on page 6)

Court Watch:

Bilingual education

A federal appeals court upheld Proposition 227, California's 1998 ballot measure to repeal bilingual education. Limited-English speakers are now taught in separate English-only classes that are supposed to last no more than a year. Parents can request waivers that allow their children to be instructed in their native language, a decision that is left up to each school district. Opponents, led by Latino civil rights organizations, argued that Proposition 227 discriminated against racial and ethnic minorities by making it impossible to restore bilingual programs. But a federal judge found no proof of intentional discrimination, and the Ninth U.S. Circuit Court of Appeals in San Francisco agreed.

College Watch:

First generations

A campus survey at UC Berkeley reported 65 percent of incoming freshmen and 55 percent of junior transfers this year have at least one foreign-born parent. Sponsors of the study said the numbers might be growing in part because the number of Asian children with a foreign-born parent is especially high. This fall, 44 percent of students entering UC Berkeley identified themselves as Asian, up from 36 percent in 1995. The proportion of Asian students with a foreign-born parent is extremely high, reaching about 99 percent for students identifying themselves as Korean and Vietnamese and about 90 percent for students of Chinese ethnicity. According to the survey by the Office of Student Research, about 23 percent of students identifying themselves as white have a foreign-born parent. About three-fourths of Latinos, two-thirds of Chicanos and about 20 to 30 percent of African American undergraduates have foreign-born parents.

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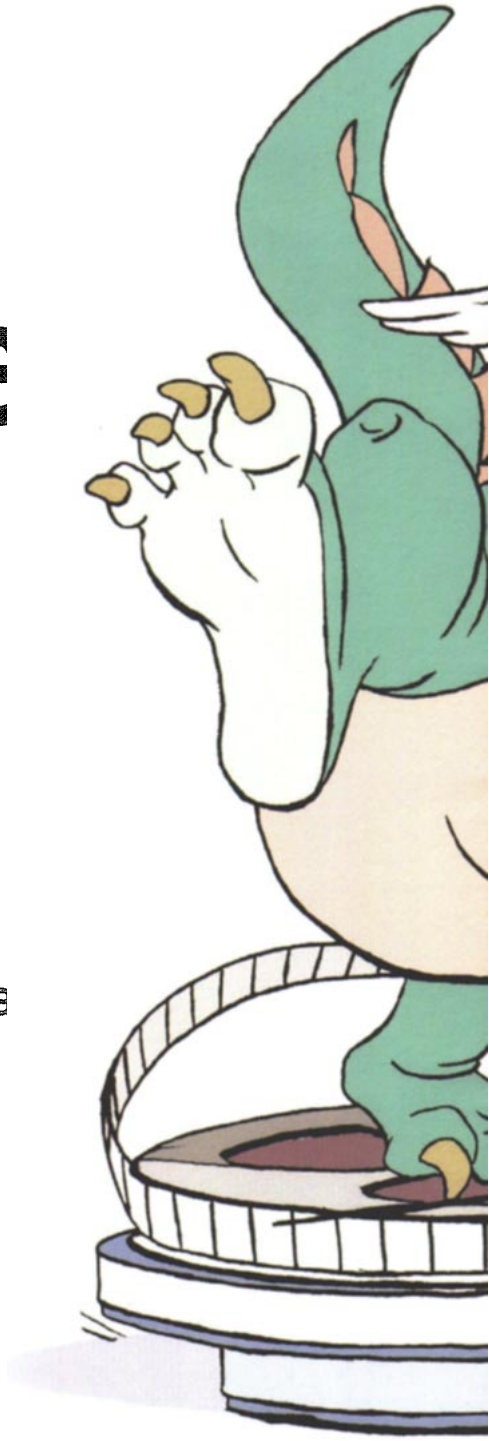
From National Journal

Digital Divide

Hollywood versus Silicon Valley: The two titan industries are locked in a struggle over copyright issues and the Internet. The battle has pulled in Washington lawmakers and regulators.

By Drew Clark and Bara Vaida



Washington

With a cue from Walt Disney Chief Executive Michael Eisner, Senate Commerce panel staffers dimmed the lights for a packed February 28 hearing in the Russell Senate Office Building. A full house of lawmakers and lobbyists settled back to watch an ABC "Nightline" segment on a 15-year-old named Benjamin who used his personal computer to go online and download the movie Men of Honor and an episode of Seinfeld, minus the ads. "You name any movie, I can find it," Benjamin declared.

At the witness table moments later, Eisner repeated that boast, hoping to hammer home Hollywood's message: Congress must act fast to protect the motion picture industry from Internet pirates like Benjamin. And the Disney chief also pointed a finger at big names in the technology industry—Intel, Microsoft, Apple Computer, Dell Computer, and Hewlett-Packard—accusing the tech giants of condoning a growing wave of digital thievery.

Seated next to Eisner was Peter Chernin, chief operating officer of News Corp., which owns the Fox network; Chernin chimed in against the tech companies. Intel and other industry giants, many of which are in Silicon Valley, are to blame, Chernin said, for stalling the effort to help protect television programs against illegal copying. But he also described an even bigger high-tech roadblock. Consumers will never switch to high-definition digital television unless high-quality content is available on the airwaves, he said, and no one will offer high-quality programs without technology to enforce copyright protections.

Then Silicon Valley had its turn. Representing this side was Les Vadasz, executive vice president at Intel, who urged the senators to keep a level head about the entertainment industry's complaints. The technology industry, Vadasz said, is 20 times the size of Hollywood, fast moving,

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Illustration by Kendall Smith

and highly innovative. "Please don't tamper with the dynamics of the technology industry," he warned. "It would do irreparable damage." Vadasz differed with a draft legislative proposal by Senator Ernest F. Hollings (D-South Carolina), chairman of the Commerce, Science, and Transportation Committee; the Hollings draft, which was circulating around Capitol Hill, would give tech firms just one year to develop anti-copying "policeware." If they didn't act, the tech companies could ultimately be subject to criminal penalties.

No sooner had Vadasz finished than Hollings launched a verbal counterattack. The chairman reminded Vadasz that semiconductor manufacturers had benefited from government assistance in the 1980s. "We 'tampered,' and we saved you," Hollings declared. "Where do you get all this 'irreparable damage' nonsense?" Vadasz meekly replied, "That is a totally different issue."

Afterward, Vadasz and other tech executives who felt they had been unfairly roughed up at the hearing were determined to hit back. They turned to one of their friends on Capitol Hill, Senate Judiciary Committee Chairman Patrick Leahy (D-Vermont), a longtime champion of new technologies, who had been dubbed the "cyber senator" in the 1990s. Leahy, whose panel has jurisdiction over intellectual-property matters, was not at all pleased that Hollings had injected himself and his committee into the copyright-protection debate.

So Leahy convened a rival hearing and scheduled

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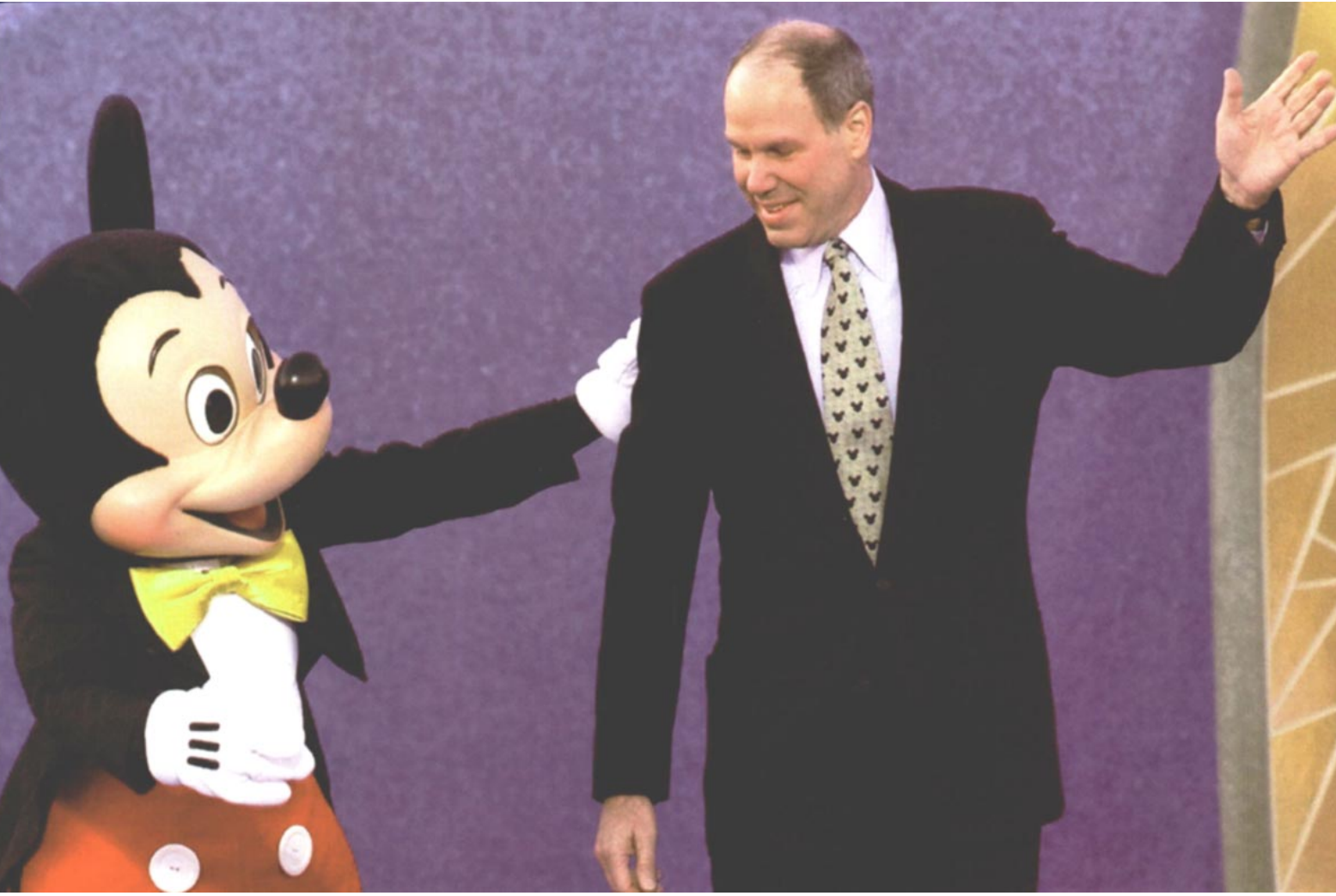

Disney CEO Michael Eisner, shown with Hollywood icon Mickey Mouse, urged the studios to take a hard line against the tech industry. Reuters: Sam Microvich, Anaheim 2/08/01

Craig Barrett, chief executive officer of Intel, as his star witness. Now the battle lines were drawn: Leahy and the tech barons versus Hollings and the Hollywood moguls.

Barrett's message at the March 14 Judiciary hearing was this: Intel respects intellectual property and has long worked with Hollywood on solutions to combat piracy, but the government shouldn't force the tech industry to solve the problem through regulatory mandates.

Leahy, too, threw cold water on the "congressional intervention" approach pushed by Hollings and the studios. He warned that the draft legislation would give tech companies too little time to come up with a solution before allowing the government to step in and take over the job of developing a so-called "digital-rights management system." Senator Maria Cantwell (D-Washington) agreed. She had been an executive at Seattle-based RealNetworks—whose software allows video and music to be distributed on the Internet — and at the hearing, she questioned why the government was getting involved in "picking technology winners and losers."

Rival Visions

Hollywood versus Silicon Valley. Over the past year, the two mega-industries have been locked in a highly public fight in Washington, unable to agree on how to keep the Internet from becoming a pirates' haven. The stakes are high, because the outcome of the battle will help define the computers, televisions, digital videodisc players, and yet-unimagined electronic devices of the 21st century.

These two giants have clashed before. In the late 1970s, the movie studios feared that the newly developed videocassette recorder would slash theater revenues. Hollywood filed copyright-infringement lawsuits against VCR manufacturers. In a 1982 congressional hearing, Jack Valenti, the head of the Motion Picture Association of America, compared the VCR to the Boston Strangler. Hollywood lost that fight in 1984 when the U.S. Supreme Court decided in *Sony Corp. v. Universal City Studios* that consumers have a right to tape television broadcasts for watching at another time or on another machine.

The legal principle is that a consumer can make "fair use" of copyrighted material. But copyright expert Peter Jaszi, a law professor at American University, also points out that "a very important part of the Sony analysis is that new information technology that benefits consumers is a presumptively good thing."

Hollywood has never been comfortable with that definition of "fair use," and in this era of digitized content, the movie industry's discomfort has turned into alarm. The studios could live with piracy in an analog world, in which videotapes degrade with each reproduction. But today's Internet-based digital technologies permit broad and in-

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stantaneous distribution of digital copies, each one just as high-quality as the previous version. That cuts to the heart of Hollywood's distribution system and eats into studio profits, even as it simultaneously creates new revenue opportunities. Hollywood now makes more money on videocassettes than on box-office sales.

Napster's meteoric rise in 1999-2000 made the implications of piracy apparent to the recording industry. Millions of music lovers began sharing songs in the form of digital files over the Internet. The recording industry's lawsuits finally shut Napster down, but today's next-generation software, such as KaZaA and Morpheus, allows transmission of digital movies and books. Recording-industry sales are slumping because of such software, the music labels say. Now the movie industry is getting worried.

"What is past is prologue," says Matt Gerson, senior vice president of U.S. public policy for Vivendi Universal, a French conglomerate that owns a record label and a studio. "Music had the disadvantage of being first. But the movie industry is paying close attention because they face the same dilemma — it is just a matter of when."

Technology-industry players disagree, saying that the recording industry has only itself to blame. Napster happened, tech companies argue, because the recording industry failed to respond to the realities of the Internet and to consumer demand. The recording industry wasn't willing — until recently — to sacrifice its big profit margins from CD sales for untested models of digital distribution. The recording industry began by suing companies that created digital music players. But consumers wanted music on the Web, and that demand turned to outright rebellion when Napster opened the door to easy file-sharing.

As Intel's Vadasz sees it, movie companies have to make the leap to the Internet, just as the recording industry had to move from vinyl records to CDs and is now slowly moving to online distribution. "At least 90 percent of the issue is having the right business model," he says. "Right now, the movie industry has virtually none that uses the Internet."

Meanwhile, more and more politicians are being drawn into the conflict. The firestorm that was ignited earlier this year by Hollings' proposal, which he later introduced as a bill, has spawned other legislative and regulatory proposals.

Lawmakers are pushing legislation to protect digital content, often against high-technology resistance. Senator Joseph R. Biden Jr. (D-Delaware) has an anti-counterfeiting bill that could be used to deter digital redistribution. A proposal by U.S. Representatives Howard L. Berman (D-Los Angeles) and Howard Coble (R-North Carolina) has raised fears about computer security, because it would exempt copyright holders from anti-hacking laws when they strike electronically at so-called peer-to-peer networks — which connect people without using a Web site.

"The evidence is that this is an increasing battle, not one that is going to be resolved in the short term... This is a struggle to the death."
— Lawrence Lessig, Stanford law professor

Not surprisingly, the Federal Communications Commission has been drawn into the fray. At the request of Hollings and the top two members of the House Energy and Commerce Committee, Chairman W.J. "Billy" Tauzin (R-Louisiana) and U.S. Representative John D. Dingell (D-Michigan), the FCC in August agreed to consider new rules to help thwart potential online piracy. Should this FCC rule-making gather steam, it could force a redesign of all new computers and consumer electronics devices that receive digital television signals.

"The evidence is that this is an increasing battle, not one that is going to be resolved in the short term," says Lawrence Lessig, a Stanford University law professor and an expert on the Internet and legal issues. Lessig, who has debated Valenti on copyright issues, sees the fight between California's two dominant industries — Silicon Valley in the north, Hollywood in the south — as a war over rival visions of the digital future. "This is a struggle to the death."

Struggling for a solution

Now almost forgotten, the first major battle of the digital age was born of a 1996 agreement between the movie industry, through its trade group, the MPAA, and consumer electronics manufacturers. Sony and Matsushita Electric Industrial were among the companies that had developed a digital videotape recorder they thought would replace conventional analog recorders. But the manufacturers could not afford to alienate Hollywood, so they negotiated specifications that would keep the recorders from making more than one copy of a movie or TV program. The agreement was shopped around Washington in the form of proposed federal legislation.

Because the proposal would have applied to computers too, the manufacturers and their studio allies eventually sought the blessing of the Information Technology Industry Council, a Washington-based association for the computer industry. Foreshadowing the present battle, the ITI expressed outrage over what it said the agreement would do to its member companies.

The proposal "was madness, because it wouldn't have

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Allies: Microsoft CEO Bill Gates (left) with Intel CEO Craig Barrett (right). Reuters: Jeff Chrsitensen, 10/25/01

done what the movie and consumer electronics guys wanted," says Rhett Dawson, ITI's president. The proposal would have required every computer to scan every digital file that it processed — whether a movie, a spreadsheet, or a personal e-mail — and look for a code on whether copying was permitted.

Dawson says it would have slowed computer performance by as much as 50 percent, with no apparent benefit to the user.

The tech industry's angry reaction halted movement on the proposed legislation, but Hollywood and Silicon Valley agreed that they needed to find a solution. The first meeting of the two industries was held in 1996 at the Washington headquarters of Patton Boggs, the heavyweight law and lobbying firm that represents consumer electronic interests. The heads of all affected trade associations gathered in the "war room" at Patton Boggs and created the Copy Protection Technical Working Group to tackle the problem. The group eventually grew to 120 engineers, who pored over minute design details during monthly meetings at a Burbank, California hotel.

Within six months, the group had worked out an answer: an encryption scheme that scrambles content and hides it from anyone who is not supposed to see it. Encryption is now used in DVDs, one of the most quickly adopted entertainment formats ever. The solution has been a bonanza for all parties. U.S. consumers spent $4.6 billion on DVDs in 2001, and more than 25 million households now have DVD players, according to the International Recording Media Association. The tech industry views that boom as a testament to the value of business dialogue and technical collaboration — outside of Washington.

Some other challenges were harder to overcome. The working group spent four years talking about how to protect digital content that is distributed over satellite and cable systems. Engineers at Intel, Matsushita, Sony, Toshiba, and Hitachi— dubbed the "5C" group because most of the five were consumer electronics manufacturers — created an encryption technology that would block anyone from moving films from a cable box atop a TV set to a computer hard drive. That solution appealed to some in the movie business, such as AOL Time Warner, which owns cable systems. But the new encryption scheme didn't please studios that own television networks, such as Disney and News Corp. For Disney, which owns ABC, and for News Corp., which owns Fox, it offered no protection for movies broadcast over the public airwaves.

Technologists at Disney urged the company to sign on anyway, but Preston Padden, Disney's top lobbyist in Washington, overruled them, insisting that all five electronics manufacturers had to agree to broaden their technology to cover broadcasts as well as cable systems. "We

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asked a million times, and we were told it was not possible," Padden says.

At Fox Group, meanwhile, Andy Setos, the president of engineering, devised his own fix, a technology called the "broadcast flag," designed to automatically stop a consumer from sending a pirated file over the Internet. The Setos solution gave Disney and Fox what they wanted, and it was presented to the 5C group. In September 2001, Setos pressed the manufacturers on whether they thought the idea was technically sound. Industry leaders conceded that it would work, but they were worried about antitrust issues involving licensing. Even the broadcast-flag technology failed to address an infinitely harder problem: how to stop people from using the Internet to spread movies from sources other than digital television. Disney used that limitation as an opportunity to reframe the debate. Eisner had been taking his case on digital piracy to members of Congress since at least 2000. A traditionally Democratic donor in a predominantly Democratic industry, he had no takers for his ideas until Democrats gained control of the Senate in June 2001. Within a month, Hollings had made Disney's approach of government intervention against piracy a top priority. Rumors of the Hollings-Disney agreement stirred angry memories of the 1996 fight over digital video recorders. Tempers flared in August 2001 at an annual retreat in Aspen, Colorado, for leaders of both camps, hosted by the Progress & Freedom Foundation, a tech-policy think tank. Dawson of the ITI took MPAA Executive Vice President Fritz Attaway to task for running to Congress. "We are committed to protecting your intellectual property," Dawson told the movie-industry lobbyist, "but we are not committed to protecting your business model."

Hollywood's smooth touch

Eisner felt confident that Congress would help his company. Disney was an American icon and had won legislative battles before. The company had benefited from a 1998 law that added 20 years to all copyright terms, thus enabling Disney to hold on to its 1928 copyright on Mickey Mouse beyond 2003. (The law is being challenged before the Supreme Court.) Eisner also had the ear of key legislators such as Hollings and a key ally in Valenti, the 81-year-old master of the Washington lobbying game.

"Valenti is rhetorically light-years ahead of everyone else," says Jim Kohlenberger, a former senior policy adviser to Vice President Al Gore. "He has a way of telling a story and making a compelling case on any issue."

Eisner believed that the private-sector negotiations were moving too slowly and that the technology CEOs were giving too little attention to digital piracy. Only after Labor Day 2001, when Hollings circulated his draft bill — backed by Disney and Fox — did executives from Intel, Microsoft, Hewlett-Packard and Cisco Systems agree to hear Hollywood's pitch. The Hollings draft would give tech firms one year to agree upon a single, mandatory anti-piracy

Hollywood's Wish List

	WHAT HOLLYWOOD SAYS	WHAT HIGH-TECH SAYS	WHAT "CYBERTARIANS" SAY
IMPLEMENTING THE "BROADCAST FLAG"	Over-the-air television broadcasts need to be protected with technologies such as those deployed to protect cable and satellite transmissions. Congress or the FCC should mandate that all television receivers include technology to detect invisible digital "flags" attached to broadcasts that would automatically stop a consumer from sending them over the Internet.	Intel, computer companies, and some consumer electronics manufacturers are willing to support legislation or regulation to enforce the "broadcast flag" developed by Fox. But Microsoft, Philips, Sharp, Thomson, and Zenith have raised concerns that the proposal gives Hollywood the power to veto new technologies.	The flag will deprive consumers of "fair use," including the ability to e-mail a video clip to a friend or relative, and boost the price of electronic equipment. Some programmers say that mandating technology to search for flags would ban emerging "open-source software" designed to receive digital video signals.
PLUGGING THE "ANALOG HOLE"	Even if all televisions included flag-detection technology, consumers could get around them and re-digitize movies by hooking a computer to the analog output of their conventional television or VCR. Congress should require virtually all electronic devices to include "watermark detectors" that would stop illegal copying.	Unlike encrypted DVDs, watermarks won't work in protecting digital content because they don't scramble content and can be easily bypassed. Hollywood can use them to trace copyright infringement without legislation. Besides, putting detectors into every computer, set-top box, and camcorder would slow them down and cost a lot.	Watermark detectors would disable technologies that can be used in many lawful ways. This would result in drastic consequences for consumers, such as making a camcorder shut itself off if inadvertently pointed in the direction of a television playing a copyrighted cartoon.
STOPPING COPYRIGHT INFRINGEMENT ON "PEER-TO-PEER" NETWORKS	Technology companies selling computers, Internet service, and CD-burners benefit from demand driven by massive illegal copyright infringement on peer-to-peer networks like KaZaA. They need to design technologies to stop digital "file-sharing" rather than promoting it.	No technologies can currently recognize copyrighted material traveling over the Internet without massive online surveillance. Hollywood should work instead on prosecuting Internet pirates, educating consumers, and cutting prices.	Peer-to-peer networks represent the best way for individual artists to publicize their work without having to distribute it through a major entertainment company. Although there is some illegal copying, the networks also spur demand for consumers to buy movies and music.

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technology. Valenti was invited to a meeting arranged by TechNet, the tech industry's biggest political fund-raising organ.

Days after the September 11 terrorist attacks, MPAA's Valenti, Disney's Padden and Fox's Setos flew on Disney's corporate jet from Burbank to San Jose. At a Silicon Valley hotel, they hooked up with representatives from Vivendi and AOL Time Warner and went as a group to the TechNet meeting. Valenti urged the tech folks to do more to stop online piracy. The MPAA chief added that he wasn't backing the Hollings plan — just yet. But according to Tech-Net President Rick White, who had co-founded the Congressional Internet Caucus when he was a House member from Seattle, Valenti warned that the Hollings approach "might be what had to happen."

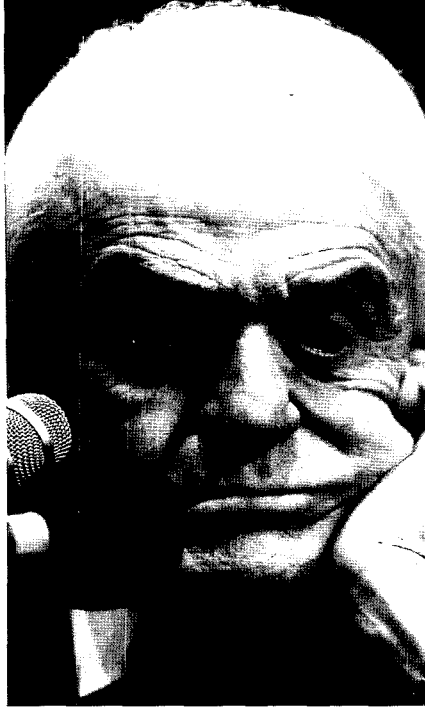
No, the tech executives said, a process to resolve differences between the two industries was already in place: the technical working group formed in 1996. But Valenti wanted a CEO-level dialogue, not another meeting of the engineers. White promised to get back to Valenti and then rebuffed the request. Later, the tech executives changed their tune. On the eve of the Commerce Committee hearing in February, Barrett and others promised the studios a CEO-level dialogue.

Meanwhile, Valenti upped the ante by beginning to speak out in public about the technology industry's stubborn refusal to cooperate with Hollywood. "There is this new technology mind-set that there should be no regulation, no rules of the road, and that this is Dodge City without a sheriff," Valenti said in an interview. The Internet is no different from cable, satellite, or United Parcel Service, he said. "Every other delivery system operates under ground rules, so why is the Internet to be exempt?" Ironically, high-tech companies were looking for help from the government in another area. They'd been pressing for regulatory order in the messy world of telecommunications, including high-speed data services. "Broadband" Internet connections are available to up to 85 percent of homes, but fewer than 10 percent subscribe, according to the FCC.

Now Hollywood had a bargaining chip. Seeing that the tech industry wanted to use broadband as a shot in the arm for its own economic woes, the studios came up with a new argument: Consumers won't buy broadband until high-quality digital content is available, and that won't happen without protection for the content.

At a December 2001 Commerce Department forum, Hollywood's Valenti and Silicon Valley's Dawson publicly dueled over the issue. "We live or die by broadband," Dawson said, adding that his industry would work privately with the studios on content protection as a way to spur broadband. Valenti countered that a deadline was necessary. "If a man is about to be hanged, it concentrates the mind," he said. "The only alternative to being hanged is to go to Congress." Such important work couldn't be accomplished with "some noose being waved around," Dawson responded.

Disney and Fox now favored strong-arming the technology industry with legislation. Ever since Hollings had made his legislative gambit, motion picture executives had been tearing apart their trade association, fighting over strategy. Some, such as those from AOL and Sony, favored sticking with private-industry negotiations. But Valenti stepped in and put together a tough agenda that would unite all the studios on the same page through 2002. First, they would ask Congress to legislate the broadcast-flag technology. Second, they would ask Congress to require all digital devices to recognize and stop illegal copying of Hollywood films that carried a digital "watermark." Third, they would push technology companies to find ways to keep peer-to-peer users from spreading copyrighted materials around the Internet.



Jack Valenti, Hollywood lobbyist, listens to testimony before the Senate Judiciary Committee in 2001 exploring ways to protec online entertainment copyrights. Reuters: William Philpott, 4/3/01

"Even though our strategies might be different, at the end of the day, all of us agreed on those three basic principles," says Elizabeth Frazee, the top copyright lobbyist for AOL Time Warner, a company that had never advocated the hard line adopted by Disney and Fox. "It was nice to find something we could agree on." The result: Hollywood spoke with a single voice, with Hollings as their foremost advocate.

Technology industry finds its voice

The Hungarian-born Vadasz was among the group of six engineers who had fled a larger firm to create Intel in 1968, and he was the third employee on the new silicon chipmaker's roster. He and the others who formed Intel wrote the rule book for countless Silicon Valley start-ups to follow. One attribute of Intel's hard-hitting engineering culture is its ability to reinvent itself when necessary. In 1985, CEO Andrew Grove, under competitive pressure from Japanese manufacturers, scrapped the company's core business of making memory chips, and turned to microprocessors. The company also received federal funds for research and development in the late 1980s, as highlighted by Hollings at the February 2002 hearing. Intel's well-oiled machine now pumps out microprocessors that double in power every 18 months. This engine was in large measure responsible for the personal computer explosion of the early 1990s, which eventually produced machines powerful enough to play digital songs and movies.

Intel has been central to the technology industry's successes and to the lavish attention it began to receive

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from Washington in the late 1990s. With the rise of the technology-driven economy and the then-booming stock market, legislators flocked to join the Congressional Internet Caucus and to bask in the aura of the "New Economy" that was going to change everything. The allure was so strong that dot-com multimillionaires barely out of college could command audiences with prominent House and Senate leaders, and lawmakers jockeyed to be the first to visit Silicon Valley and see the future in operation.

"They have been wildly successful in convincing Congress that what is good for technology is good for the nation," says Bruce Mehlman, assistant secretary of Commerce for technology policy, and a former Cisco Systems lobbyist. That's why tech executives and lobbyists were incredulous when they first heard about Hollings's draft proposal. "We didn't assume that anyone would introduce such an anti-innovation bill," Vadasz says. To the tech industry, the plan essentially required the government to set standards for products that didn't even exist. Princeton computer scientist Ed Felten compared it to setting a standard for teleportation. Even where protection technology existed, such mandates would retard innovation by injecting bureaucrats into the industry's typical 18-month production cycle and would create a single, identifiable target for hackers, according to Vadasz. Worse, said Intel and other tech companies, no one could design one technological standard for the wide variety of electronic devices the Hollings plan was meant to cover.

"You can use lots of appliances to view movies," says Emery Simon, counsel to the Business Software Alliance. "All have different processing and memory capacities — and they want a single end-to-end solution? It's like trying to design one dress that fits all women. It won't happen." The idea was such a bad dream to the high-tech industry that most senior executives at first refused to even debate it. But Hollings and Hollywood were undeterred; in March, the Commerce Committee chairman introduced the Consumer Broadband and Digital Television Promotion Act, to immediate applause from the motion picture industry. "We should have taken the issue seriously earlier," Vadasz admits. "Shame on us."

High-tech lobbyists thought they could use the clout of their trade associations to kill the bill quickly. They were so dead set against the measure that they refused even to make suggestions for improvement, says Al Mottur, senior Democratic counsel at the Senate Commerce Committee. Software companies reminded lawmakers of their support for efforts to combat software piracy, which they claimed cost them $11 billion annually. But when legislators pressed back, the high-tech lobbyists weren't able to articulate why they — the very architects of the Internet — couldn't stop movie piracy.

"The sense from the Hill is that the tech guys are geniuses. They can figure this out," says Doug Comer, Intel's director of legal affairs and its top Washington lobbyist.

The tech sector had chalked up past legislative victories, but had never faced such a determined and politically connected adversary as Hollywood.

The tech sector had chalked up past legislative victories, but it had never faced such a determined and politically connected adversary as Hollywood. Entertainment executives barraged lawmakers with statistics about how technology had benefited from the growth of Internet traffic, CD-burners, and easy access to copyrighted material — implicitly indicting the tech companies. In a move particularly upsetting to Silicon Valley companies, Senator Dianne Feinstein, a Northern California Democrat, signed on to the Hollings bill.

But Silicon Valley still had a host of powerful allies among both Democrats and Republicans. The industry shifted to the offensive after Hollings's hearing. Top executives such as Barrett and Vadasz asked legislators why high-tech should bear the brunt of government regulation to help someone else's industry. They also argued that a mandate would spark a backlash by consumers accustomed to their online freedoms.

"If Ford couldn't make any Explorer go over 65 miles an hour, would that meet consumer expectations? Probably not," Barrett said in an interview. Soon other CEOs, such as Apple Computer's Steve Jobs and Gateway's Ted Waitt, joined the fight. Gateway went so far as to launch a marketing campaign promoting CD-burning and aired its first advocacy commercial, urging consumers to fight the Hollings bill. Every D.C.-based technology association declared its opposition.

The tech industry's growing involvement began to counter Hollywood's early advantage. "The content community has dominated the public policy debate on intellectual property," says U.S. Representive Rick Boucher (D-Virginia) co-chairman of the Internet Caucus. "High-tech companies are now engaged, and we will have a much more balanced result."

House Commerce Committee Chairman Tauzin agreed. "I get the sense that [both industries] are impressed with the other's effectiveness." Tauzin said in an interview. "The sense of jeopardy is important. If either side feels that they don't have to worry about the other side, you don't get an agreement."

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Consumer manufacturers balk

Tauzin has a particular need for the two combatants to eventually work together. His committee is responsible for ensuring that broadcasters adopt digital television — part of a congressional plan hatched in the early 1990s to offer higher-quality TV and simultaneously free up the airwaves for new wireless technologies. By 2006, all broadcast stations are supposed to be transmitting in digital formats. But studios still face the problem of users' unlawfully retransmitting digital products over the Internet, the same problem the music industry experienced with Napster.

Microsoft... has in turn played a key behind-the-scenes role in crippling Hollywood's digital "watermark" proposal.

The studios' fears about broadcasting their movies over the airwaves in digital format was behind Disney's and Fox's objection to the 5C technology that protected cable and satellite distribution, but not broadcasting.

Technology companies argue that encryption can provide the anti-piracy solution for television signals, just as it has for DVDs, cable, and satellite systems. But few in Washington view that scenario as politically viable: The United States has a strong tradition of transmitting television unscrambled and available to everyone.

Fox says the broadcast-flag technology is the best approach. Digital televisions would scan the programs for the flag and block the user from resending it over the Internet. But a law or regulation is needed to enforce this approach, which is item number-one on the motion picture agenda.

Facing pressure from Hollings, technology companies said they would consider the broadcast flag. After months of mind-numbing technical haggling, tech industry and studio representatives unveiled what seemed to be an agreement at an April hearing called by Tauzin to spotlight the stalled transition to digital TV. AOL Time Warner's then-CEO-designate Richard Parsons, Fox's Chernin, and Paul Liao, the chief technology officer for Matsushita's Panasonic, all extolled the broadcast flag, saying it would protect against Internet piracy without blocking consumers' ability to copy programs.

While Intel and other computer companies did sign on to the flag technology, some consumer electronics manufacturers were balking. Philips Consumer Electronics — the Dutch-held company that co-invented the CD technology and now leads the market in DVD recorders — saw the proposal as a direct threat. Larry Blanford, head of Philips's North American operations, objected, arguing that the broadcast flag would deprive consumers of DVD recorders and other digital technologies. "What we are talking about is putting innovation under a small group of people," says Mike Epstein, senior researcher at Philips.

Tauzin urged the parties to keep working on an industry-to-industry compromise. But instead, more consumer electronics companies — Thomson Consumer Electronics, Zenith Electronics, and Sharp Electronics — dissented. Microsoft, whose own digital-rights management technology had been rejected by the studios, also objected. The software giant has in turn played a key behind-the-scenes role in crippling Hollywood's digital "watermark" proposal.

Adding to the chorus, groups representing computer users and consumers argued that the Hollings proposal would jeopardize fair use by limiting, for example, a proud parent's ability to e-mail a digitally recorded home video clip to a relative across the country. Gary Shapiro, president of the Consumer Electronics Association, makes a similar point about Hollywood's overbearing approach. Congress, he says, is not likely to sanction "restrictions on consumers that are absurd."

Tauzin and Dingell said in mid-July that consumers' interests were uppermost in their minds. But less than a week later, they sent a letter to FCC Chairman Michael Powell urging him to begin work on regulations to mandate the broadcast-flag technology. On the same day, Powell got a letter from Hollings that also urged immediate action on the flag. Three weeks later, in August, the FCC unanimously issued a proposed rule-making on adopting the broadcast flag. "By Washington standards, that is blinding speed," said Disney's Padden, who is happy to call the FCC action the first success of Hollings' legislative push.

Cybertarians and consumers respond

The tech barons and the Hollywood moguls traded harsh words a few weeks ago at the annual Aspen summit hosted by the Progress & Freedom Foundation. Chernin called tech companies "amoral," and Vadasz called entertainment "unimportant." Valenti, in his unique silver-tongued style, told Vadasz: "It is easy to tell a man to go to hell, but much harder to get him to do that."

Beginning to make their voices heard in earnest are organizations such as the Electronic Frontier Foundation, a 12-year-old digital-liberties group, which is fighting Hollywood and Hollings.

EFF began raising the cry against the Hollings bill a year ago through an e-mail campaign, and the group later released a one-minute video parody on Disney. "Who believes the average Jane's a criminal on the make? Disney and its showbiz friends, who have a lot at stake," it sang, to the tune of the Mickey Mouse Club theme song.

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Fred von Lohmann, a ponytail-sporting lawyer at EFF, sees the fight against the Hollings proposal as a broader battle over "whether or not Hollywood will be entitled to install a lawyer into every engineering meeting at every technology company." EFF and other digital-rights advocates have tapped into a wellspring of anger against the entertainment industry. In April, they spurred more than 3,300 people to write letters to the Senate Judiciary Committee opposing the Hollings bill. The committee posted many of the comments on its Web site.

Dovetailing with EFF's grass-roots strategy are two well-connected Silicon Valley executives, Joe Kraus and Graham Spencer, who are promoting a "consumer technology bill of rights." Their insider efforts against Hollings' bill—coupled with the opposition of such groups as Consumers Union and the American Library Association—have helped EFF's arguments gain traction on Capitol Hill. Motion picture studios say they welcome consumer groups to the table. Meanwhile, the technology industry has strengthened its hand by adopting much of the rhetoric of the consumer advocates.

"It resonates with lawmakers," said a staff member who works for one key Senate Democrat.

After a year of draft legislation, proposals, counterproposals, speeches, hearings, behind-the-scenes negotiations, lobbying and letter-writing, the fight is as fierce as ever. The clash between Hollywood and Silicon Valley over online piracy has now engaged additional players on each side. More important, it has engaged the broader public—millions of Americans whose lives are becoming more and more intertwined in the digital revolution.

This article was previously published in the National Journal, an independent magazine about politics and policy in Washington. Drew Clark and Bara Vaida are senior writers for National Journal's TechnologyDaily. *They can be reached at dclark@nationaljournal.com and bvaida@nationaljournal.com. Internet links and background information related to this article are available to* National Journal *subscribers at the magazine's Web site, www.nationaljournal.com.*

Cybertarians at the Gate

By Carl M. Cannon

It happened so quickly it was easy to miss, but the ideological chasm between intellectual-property owners and the community of free-ranging cyberspace consumers was highlighted this summer during a conference at the Commerce Department.

The revealing moment came when James E. Rogan, the Commerce undersecretary for intellectual property, made a conciliatory gesture to the two warring industries in the disputation over digital-copyright policy. Looking at representatives of Hollywood and the recording industry, as well the makers of the computers and software that make it so easy to steal the studios' content, Rogan said, "There are no villains here."

Rogan certainly has credentials as an honest broker. He was born and raised in the San Francisco Bay Area just as Silicon Valley emerged as the great engine of American innovation and wealth. He retained an affinity for technology companies after moving to Southern California, and during his time in Congress he co-chaired a GOP working group on tech-friendly initiatives. Still, Rogan's district included the studio-rich community of Burbank, and so attuned was he to the concept of constituent service that sometimes he seemed to be "Jim Rogan, R-Disney."

On this day, July 17, Rogan was merely attempting

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a conciliatory tone. But his "no villains" comment instead inspired derisive whistling and hooting from the corner of the room inhabited by the cyberspace activists. The reaction may have surprised Rogan, but in the cyber-community that favors unfettered access to the vast contents of the Internet, such disdain for the niceties and business-as-usual approach of official Washington is the norm.

In the past decade, these file-sharing, content-downloading computer literates have coalesced into a kind of free-floating political movement. Its theorists view the studios and record companies — and the politicians who kowtow to them — as the enemies of free expression. As for the computer makers and software companies that are willing to negotiate a technological solution to the issue of unauthorized digital downloading of music, movies and software, well, the activists consider them sellouts. In other words, for a certain group of Internet-savvy users and activists, Room 4830 of the Herbert Hoover Building was filled with villains.

"They're looking out for their interests, and it's not necessarily for the public good," says Will Doherty, a San Francisco-based free-expression activist.

Doherty and his fellow devotees of an emancipated digital universe have been called many things: hackers, computer geeks, libertarians, futurists, anarchists — and worse. Hollywood's Washington fixture Jack Valenti routinely characterizes them as thieves. Walt Disney's corporate chief, Michael Eisner, told Congress they were pirates. Let's call them, for our purposes, cybertarians.

True to their nature, cybertarians have nothing approaching a hierarchy or a headquarters, let alone an established Washington lobbying operation. Obviously, they have no organized method — nor any real inclination — to funnel money to politicians sympathetic to their laissez-faire ways. For all those reasons, they enjoy little influence on Capitol Hill or in the Bush administration. In a very real sense, they simply do not exist as players in the Washington scene. The cybertarians are already influential in their world, however, a fact that the Jack Valentis of the world know only too well. The logic of cybertarians — expressed by one cybertarian organization, DigitalConsumer.org, as a "Consumer Technology Bill of Rights"— is one of the reasons college kids feel so little guilt when they download the latest music into their computers or when they "burn" CDs of their favorite artists. The cybertarian dialectic goes something like this: Sure, artists have a right to profit from the songs they write and perform. But the record industry, for reasons of pure greed, hasn't changed its pricing or marketing strategies since the advent of 78 r.p.m. records. By ignoring the fact that technology has given consumers the freedom to pick and choose cuts by different artists and put them on the same disc, the record labels were, in essence, extorting consumers into buying products they didn't want.

Hollywood is doing the same thing, with only slightly more subtlety. In Senate testimony earlier this year, a former Silicon Valley entrepreneur named Joe Kraus told of buying a DVD player for his father for Christmas, only to find that it was built — per the specs allowed by Congress — to prevent him from fast-forwarding through the movie previews. "Under the guise of 'preventing illegal copying,' I believe Hollywood is using the legislative process to create new lines of business at consumers' expense," says Kraus, co-founder of DigitalConsumer.org. "Their goal is to create a legal system that denies consumers their personal-use rights and then charge those consumers additional fees to recoup them."

The cybertarian dialectic goes something like this... the record industry, for reasons of pure greed, hasn't changed its pricing or marketing strategies since the advent of 78 r.p.m.

Even copyright moderates who believe the cybertarians go too far concede that their arguments have been bolstered by the heavy-handed business and legislative approaches of their adversaries. The cybertarians never tire of reminding Valenti that in 1982 he compared the threat posed by the VCR to the movie industry to that of the Boston Strangler to a woman living alone — or that Hollywood's success in delaying the advent of the new technology has cost the studios billions of dollars.

A second cybertarian argument is that the copyright laws are stacked to reward big corporations and screw the artists. They cite the Beatles, who lost the copyrights to their own songs to Michael Jackson — who refuses to sell back the 50 percent he still owns. A most egregious example to the cybertarians is that of Mickey Mouse. His likeness was scheduled to enter the public domain in 2003 — until Disney, which makes generous donations to both political parties, persuaded Congress to push the deadline back another 20 years. Disney's extension of its copyright is being challenged at the Supreme Court by a high-powered team of nationally prominent law professors, many of whom are affiliated with Harvard's Berkman Center for Internet & Society and a similarly named center based at Stanford University's law school.

If the cybertarians have a star —

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their equivalent of Eisner or Valenti — it's a Berkman Center fellow named John Perry Barlow. John Perry, as he's universally known in Cybertaria, comes to the issue with unique credentials. A Wyoming rancher by upbringing and a philosopher by training — he has a degree in comparative religion — Barlow first confronted the idea of how computers will change the rules in the field of intellectual property while he was a lyricist for the Grateful Dead. The Deadheads were notorious for making bootleg copies of concerts for themselves and their friends. The practice was sanctioned by the band members, who knew that it helped create more, not less, interest in their concerts. This model is often cited by cybertarians today, although it draws only a weary shake of the head from Valenti, who sees little similarity to the studios' efforts to reduce piracy while trying to recoup the $80 million they invest in producing a movie these days. In any event, Barlow himself followed the news of the Dead from one of the earliest computer bulletin boards, called "The WELL," and he developed a passion for keeping the medium free.

Once dubbed the "Thomas Jefferson of Cyberspace" by Yahoo's *Internet Life* Magazine, Barlow penned a widely read "Declaration of the Independence of Cyberspace." He cofounded a cybertarian think tank, the San Francisco-based Electronic Frontier Foundation. For the past 12 years, EFF has litigated on behalf of the First Amendment rights of online players while serving as a clearinghouse for information about copyright and other free-speech issues. If EFF is out-gunned, out-funded, and outclassed in Washington, the group holds one strategic advantage: Because its motives are philosophical, not commercial, making it go away will be hard. EFF's mission statement begins this way:

"Imagine a world where technology can empower us all to share knowledge, ideas, thoughts, humor, music, words, and art with friends, strangers, and future generations. That world is here and now, made possible with the electronic network — the Internet — with the power to connect us all."

And what are the dangers, as the cybertarians see it?

"Governments and corporate interests worldwide are trying to prevent us from communicating freely through new technologies, just as when those in positions of power controlled the production and distribution of — or even burned — books they did not want people to read in the Middle Ages. But only by fighting for our rights to speak freely whatever the medium — whether books, telephones, or computers — can we protect and enhance the human condition."

All of that sounds noble, but there is a rub — and it's a big one.

Writers, actors, musicians, and software designers must be paid for their work — if only to give them the means to continue pursuing their art. Cybertarians like to think of themselves as being motivated by principle, not profit, but being recompensed fairly for one's work is a basic value, too. And exactly how artists will be paid in an unfettered, digitally free world is where the cybertarians falter or, at times, sound Pollyannaish.

In an e-mail exchange, *National Journal* asked Barlow whether creativity would dry up if artists weren't paid for their work. "Surely you don't believe that they pay us now?" he said, only half in jest. "Don't be ridiculous."

This notion that anything, even copyright anarchy, would be better than the currently stacked deck, is probably not a winning argument to make in the halls of Congress. It also sounds a tad cynical, but the truth is very nearly the opposite. At the heart of the cybertarians' pitch is an unbridled optimism about what human beings are capable of — so long as they are unconstrained by the machinations of overly restrictive laws and technological restraints imposed under duress.

"The weird thing is that the Hollywood guys don't have to be lined up and shot, because they are shooting themselves," says renowned futurist Kevin Kelly, in another e-mail to *NJ*. "Like the VCR before it, this digital technology is the media that ... is their livelihood in the long term, but they are [disparaging] it now. Not one of them will remember that they were against it all, 20 years from now when it's all digital and liquid."

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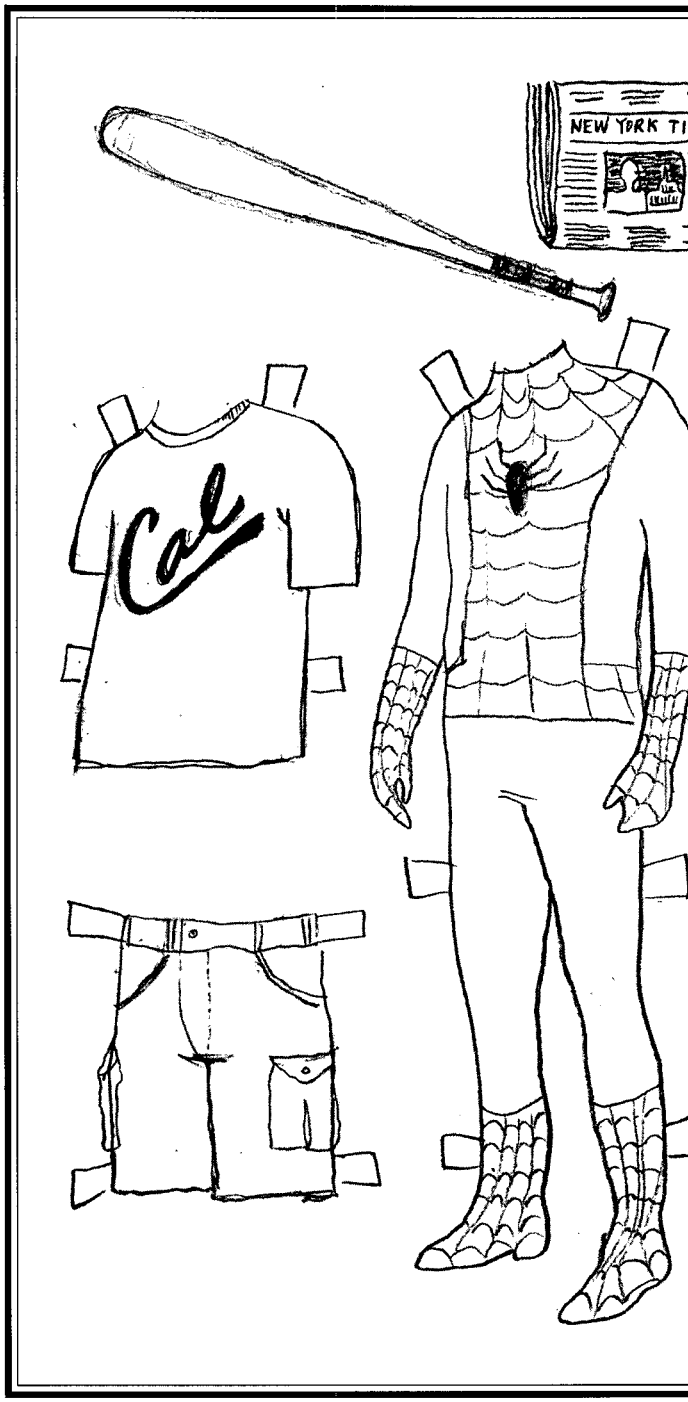
Private Parties

California's reputation for maverick, independent voters is false. In the voting booth, old-fashioned partisanship is alive and kicking.

By Phil Trounstine



Conventional wisdom in California says we Golden State voters are a fiercely independent lot, dissatisfied with the major political parties and disgusted by their partisan machinery.

Exhibit A is the rise in the number of voters who decline to state a party affiliation when they register to vote and the concomitant slide in major party registrations.

Exhibit B is the large number of people who tell pollsters they consider themselves political moderates who disapprove of the partisan bickering among the leaders in their own party.

As the authors of a newly published textbook on California politics put it: "The anti-partyism of the Progressive era has remained a powerful force in state politics, causing voters to shun party labels in statewide elections."

Well, conventional wisdom is wrong. Partisanship is alive, kicking and more important than ever before in California elections. The truth is that voters may increasingly "decline to state" their party preference, but when it comes time to cast their vote, they are more like party loyalists than independent mavericks.

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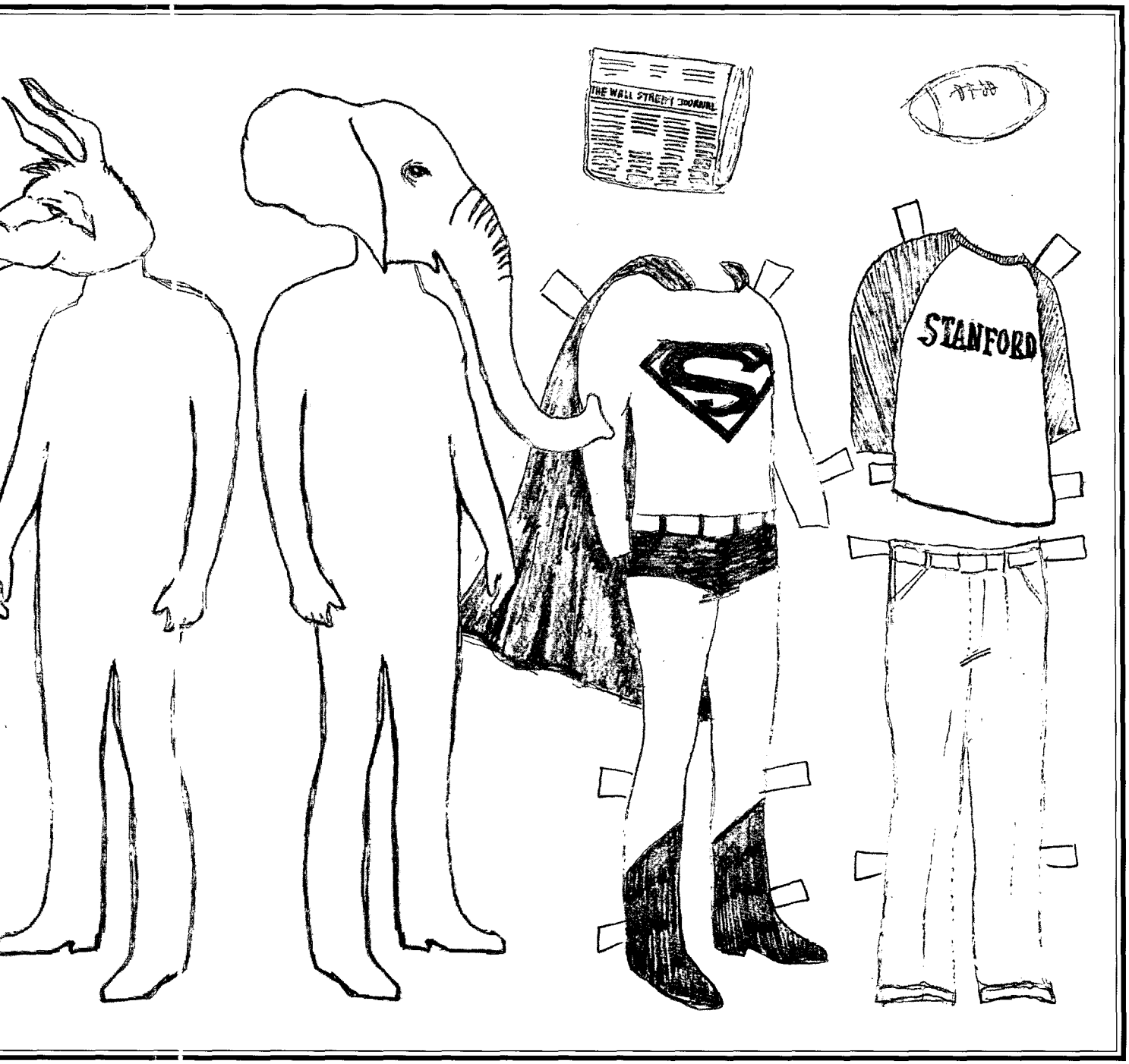

Illustration by Scarlett Shin

In fact, 'The California voter's reputation for anti-partyism, independence, ticket splitting and volatility is at least 30 years out of date and increasingly divorced from reality," Gary Jacobson, professor of political science at University of California, San Diego, recently told the Western Political Science Association.

"California's voters are more partisan, more loyal and more consistent in their voting patterns than are voters elsewhere, and they have been so for several decades," Jacobson said in a recent paper titled "Partisanship in California Elections."

And when most voters go to the polls this year, the single most important piece of information they'll rely on in deciding who to vote for will be the candidate's party.

By and large, Democrats will vote for Democrats and Republicans will vote for Republicans. And the alleged independents — California's "decline-to-state" voters — will do exactly the same: mostly, they'll vote for a Democrat or a Republican.

Voters don't shun party labels in statewide elections. They depend on them. They count on them. And they trust them.

"They're important because there aren't many other sources of information about candidates," says Terry Christensen, professor of political sci-

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ence at San Jose State University.

"If you don't look at party, you're looking at personality, what's in the ads and what little you get from the media. It's an important cue, in the absence of others," says Christensen, co-author of "California Politics and Government: A Practical Approach."

In a recent statewide survey, Mark Baldassare of the Public Policy Institute of California found that among those determined to be likely voters, 45 percent are Democrats, 37 percent are Republican and 13 percent are independents — figures that closely track the secretary of state's official registration numbers.

But Baldassare also probed for "leaners" — those independents likely to vote who say they have more in common with one of the two major parties. What he found was that 47 percent of the independents lean toward the Democratic Party and 27 percent lean toward the Republican Party.

When they are added to the likely voters registered in the major parties, his data demonstrate that 92 percent of the voters affiliate themselves with one party of the other — 51 percent with the Democrats and 41 percent with the Republicans.

The "pure independents" — those who associate with no political party — account for a minuscule 3 percent of the likely voters, according to Baldassare, author of "A California State of Mind."

None of this is surprising to Raymond Wolfinger, professor of political science at the University of California, Berkeley, and author of "The Myth of the Independent Voter."

"The numbers hold up," Wolfinger said, even before the PPIC survey data were available. "About nine in 10 people call themselves a Democrat or a Republican, or if you press them will acknowledge that they're closer to one party than the other. Most people are outright partisans or covert or closet partisans."

Moreover, he said, "If you look at whether they do or do not vote in elections, the partisan independents, or the leaners, are as likely to vote as partisans."

"The pure independents are the scum of the earth," Wolfinger said. "They're not a bunch of philosopher kings holding their fingers together and weighing the issues. They're apathetic and ignorant. They constitute about 10 percent of the population but only about 5 percent of the vote."

And what does party preference suggest about voting behavior?

Not surprisingly, in the recent PPIC survey, Democratic Governor Gray Davis was winning 69 percent of the Democratic likely vote and held an

THE PARTY LINE TEST

The difference between Democrats and Republicans goes beyond politics. Party choice is a reflection of personality and world view. This test will locate your place on the political spectrum. Circle one item from each pair and total your score from each column, then check your result on the following page.

Declaration of Independence	United States Constitution
Volvo	Mercedes
Bruce Springsteen	Merle Haggard
Bass Weejuns	Gucci loafers
freedom	responsibility
Robert Redford	Clint Eastwood
West Wing	Touched by an Angel
Letterman	Leno
law	order
Mexico	Canada
Star Trek	Star Wars
Spider Man	Superman
San Francisco	San Diego
minivan	SUV
CNN	FOX
The New Republic	National Review
Macy's	Nordstrom
UCLA	USC
equality	equal opportunity
ACLU	NRA
MasterCard	American Express
ethics	morals
Venus	Mars
Malcom	Martin
rehabilitation	punishment
New York Times	Wall Street Journal
Eve	Adam
Mendocino	Carmel
baseball	football
Nixon	Reagan
Les Miserables	Phantom of the Opera
United Farm Workers	Teamsters International
multilingualism	English only
fishing	hunting
Terri Gross	Rush Limbaugh
Cal	Stanford
affirmative action	color blindness
pro choice	pro life
beer	wine
Dalai Lama	Mother Teresa
TOTAL _____	_____ TOTAL

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overwhelming proportion of independents who lean Democratic. And Republican Bill Simon was winning 63 percent of the Republicans and an overwhelming share of the of independents who lean Republican.

Including the 11 percent of Republicans supporting Davis and the 8 percent of Democrats support Simon, fully 71 percent of the voters were supporting a major party candidate.

This is not an abnormality. "Despite the falloff in major party registration, the actual share of votes won by minor party and independent candidates has grown surprisingly little over the past three decades," Jacobson said in his paper.

In fact, he said, "The growing proportion of registrants shunning the major parties has not ... diluted the relationship between registration and voting. Quite the opposite; the relationship. . . . has grown stronger."

In part, that's because of what Jacobson calls the "decline in the historic propensity of registered Democrats to vote Republican" — a legacy of cross-filing and GOP control of California politics that has been withering in recent decades as the Republican Party has become increasingly identified with staunch conservatism.

The Democrats' gerrymander of electoral districts in the early 1980s played a role as well increasing partisan voting. But the trend continued right through the 1990s, Jacobson has found, even under court-ordered redistricting.

According to Jacobson's analysis, "Registration explained an average of 85 percent of the Assembly district-level vote for governor, president and U.S. senator in the 1970s, 86 percent in the 1980s and 90 percent in the 1990s."

Voters, it seems, have sorted themselves into two camps. Conservatives, by and large, have become Republicans, and liberals, by and large, have become Democrats.

Sam Popkin, professor of political science at UCSD, says that if he knows a person's party registration, the odds are "higher than any other single fact you could give me" in predicting how a person will vote today.

"It tells you how the voters have sorted themselves out," he said, noting that the process of alignment is as much cultural as it is political. "It's whether you're a clinical psychologist or an MBA. The geologists are all Republicans, and the biologists and pediatricians are all Democrats," he said, only half joking.

Does it make sense to use party identification as a guide to voting?

Absolutely, the experts argue.

"The electorate has sorted itself into the right parties over the years so that by and large conservatives now are Republicans and liberals by and large now are Democrats," Jacobson says.

Party labels, studies show, are strong predictors of how people will act in office.

"There is no single fact that would tell you more about the many things that any legislator is going to do," said Popkin, author of "The Reasoning Voter: Communication and Persuasion in Presidential Campaigns." "It tells you a lot about your priorities, your preferred methods and your goals."

As a consequence, Jacobson says, "In most cases, the party label gives you all the information you need to figure out which person you prefer."

But how does a voter really know which party most closely reflects his or her world view? How do people decide which party to join?

It may not be genetic, but it's absolutely cultural and familial.

Mostly, says Wolfinger, if their parents were Democrats, they become Democrats; and if their parents were Republicans, they become Republicans.

"Kids may not take a whole lot away from the dinner table, but they do take away the party identification of their parents," Wolfinger says, pointing to the one and only one study that ever has tracked teenagers and their parents for party affiliation.

"It's cultural, not organizational," Christensen agreed. "It's not because there's a guy knocking on your door saying `I'm your precinct worker.' The voters are taking their cues from what they can."

The question how people decide which party they're in reminds Wolfinger of a joke he heard in 1957 or '58 when he was doing research in New Haven for Robert Dahl, the famous political scientist at Yale.

"Two Irish ladies are sitting on the porch. One says to the other: `So, did you hear Paddy Murphy turned Republican?'

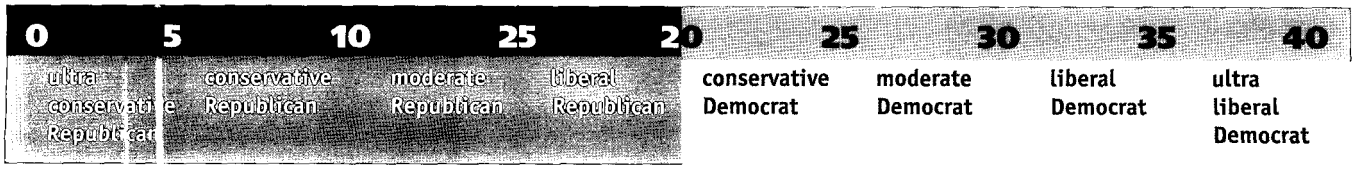
"`That's impossible,' says the other lady. `I saw him at Mass last Sunday.'"

It may no longer be possible to predict how an Irish Catholic will vote today, Popkin says. But if you ask him to predict a voter's behavior, "I'd rather know what party they are than any other single thing about them."

Philip J. Trounstine is a communications consultant and director of the Survey and Policy Research Institute at San Jose State University. He is the former political editor of the San Jose Mercury News *and former communications director for Governor Gray Davis, for whom he has worked as a private consultant. Comments on this article may be sent to* **edit@statenet.com.**

SO WHERE DO YOU BELONG?

Use your score from the left column on the previous page to find yourself on the political spectrum. This test, first published in 1994, has been refined for nearly a decade by political writer and social researcher Phil Trounstine.



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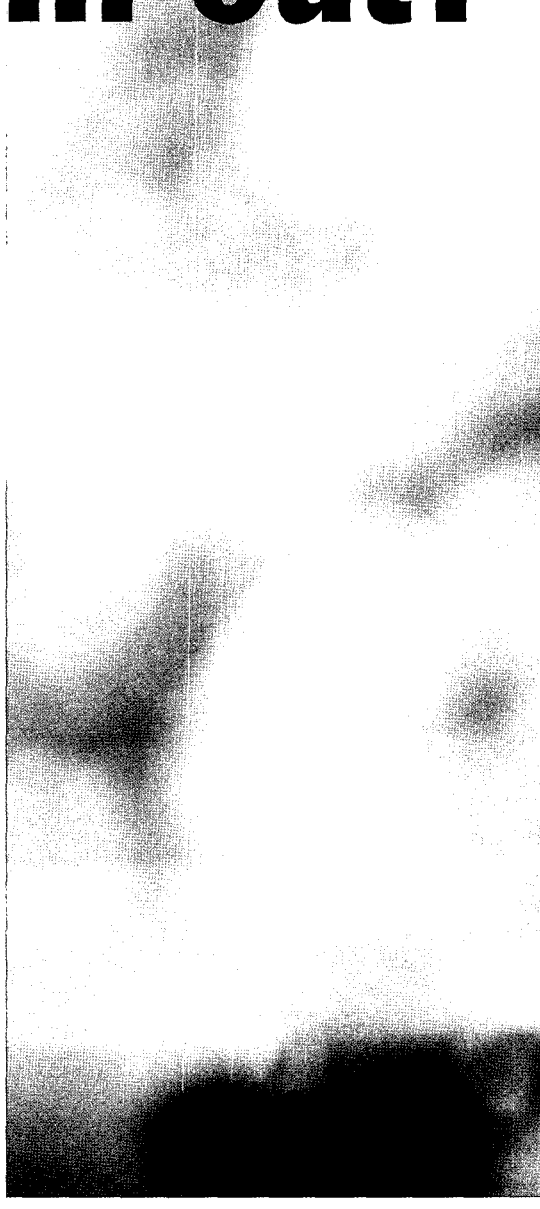
Three strikes... out?

Voters passed the landmark "three strikes" sentencing law overwhelmingly in 1994. Now, the U.S. Supreme Court will decide if the law goes too far by ordering life sentences for petty theft crimes.

By Dana Wilkie



Washington

It was a spring day nearly three years ago when Gary Albert Ewing walked into an El Segundo pro shop, slipped three golf clubs down his trousers, and tried to limp out the door, only to be stopped by a suspicious owner who decided to press charges.

Had Ewing swiped the clubs in his younger years — a decade ago, perhaps, when he was landing in trouble all the time — his life might be entirely different today. But under California's sweeping three-strikes law, the 37-year-old high school dropout got a life sentence for stealing the clubs with no chance of parole for at least a quarter century.

Whether he stays there or not, depends on what the U.S. Supreme Court has to say after it hears Ewing's attorney argue this month that California's "three strikes" law violates the U.S. Constitution's ban on cruel and unusual punishment.

The law, passed by voters in 1994, requires a sentence of 25 years-to-life for anyone convicted of three felonies. The first two convictions must be for serious or violent crimes, but the third and decisive case can involve an otherwise minor felony like petty theft.

When the nine justices return their ruling — probably in March or April — they could affirm California's criminal justice crackdown and the law that eight years ago won overwhelming support from state lawmakers and voters. Or they could soften the standard for putting third-strike criminals behind bars for 25 years or longer. The ruling could also raise doubts about nearly 350 inmates who, like Ewing, were sentenced under "three strikes" following

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Photo: Eyewire

convictions for minor crimes.

Court watchers say the judges will evaluate whether the California law violates the Eighth Amendment's protection against cruel and unusual punishment. But it will also consider the legal independence granted to states for criminal justice policy.

Even those who want to do away with the three-strikes law concede that the court has a long list of rulings supporting a state's independence when defining crime and its consequences.

"It's always difficult to predict [a ruling], but often it's been an uphill battle to get the court to overrule state policy on these issues," said Marc Mauer, assistant director for The Sentencing Project, which promotes prison alternatives and which asserts that California's three-strikes law has had no lasting effect on crime. "Over many years, the court has deferred to state legislatures in establishing penalties, even if they may seem overly severe to many observers."

California lawmakers enacted the three-strikes law in 1994 — and voters overwhelmingly approved it later that year — after a twice-convicted kidnapper named Richard Allan Davis snatched 12-year-old Polly Klaas of Petaluma from a slumber party, and then murdered her. The law

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"When the third strike is a low-level property offens
enormous amount of money a
with no guarantee this is the most effective way
— Marc Mau

requires a life sentence, with no parole for 25 years, for anyone who has two prior "strikes" — serious or violent felony convictions — and is convicted of any new felony. A criminal with a single "strike" who commits a second felony must be sentenced to twice the normal term.

Today, 7,291 men and women are serving prison terms in California for their third strike, according to the California Department of Corrections. Another 31,853 are serving terms for their second strike. For most, the crimes that landed them in jail were cases of robbery, first-degree burglary or drug possession.

For Ewing and Leandro Andrade, it was different. The two men whose cases are pending before the High Court were issued life sentences for thefts that were technically misdemeanors under California law — punishable by no more than a year behind bars and a fine. But because each had a prior criminal record, prosecutors were allowed to charge their thefts as felonies — kicking both their cases into the three-strikes arena.

The fact that prosecutors were allowed to do this will be one of the key objections that Ewing's and Andrade's attorneys will make about the three-strikes law. Though it is accepted practice to punish people more harshly if they have criminal histories, the lawyers will argue that the practice assumes drastic consequences in California. Even petty theft can become the third felony that slaps a man or woman in prison for perhaps the rest of their life.

"No matter what he may have done in the past, the crime for which Mr. Ewing is being sentenced is only for shoplifting three golf clubs," said Quin Denvir, the federal public defender representing Ewing. "We're not trying to invalidate the whole three-strikes law, but as it worked in my client's case, the sentence was grossly disproportionate to the offense."

Gary Ewing had the sort of upbringing that should breed wholesomeness, not crime. He was raised in a large family on a secluded farm near Lake Elsinore, where the Ewing children helped their parents raise cattle.

When Ewing was 10, a fire injured his mother, leaving burns over 82 percent of her body. The family moved to Columbus, Ohio, where relatives could care for her. Ewing's father sold his farm and supported the family running an auto repair shop.

Perhaps because of the move or his mother's condition, things began unraveling for Ewing in Columbus. He dropped out of high school a year before graduating. He got into drugs. He was 22 when he was arrested for his first crime — a grand theft. Four years later, right after his probation ended, he stole a car. After he moved to California in the late '80s and began working as a chef for a Seal Beach restaurant, Ewing was arrested seven more times — for petty thefts, burglary, battery, drug possession, trespassing and possessing a gun.

Shortly before Christmas in 1994, the year both his mom and his closest brother died, Gary pulled a knife on a man outside a Long Beach apartment complex, and then burgled the man's home. Weeks later, he burgled two other apartments at the same complex while the owners were there, stealing cash, jewelry and a gun. He was arrested 11 days later and convicted of robbery and residential burglary — serious crimes under California law.

Ewing served part of a nine-year sentence. When he was out, he remained relatively crime free. But California's three-strikes law makes no allowances for stretches of good behavior. When Ewing decided in March of 2000 to take off with $1,200 worth of golf clubs from the El Segundo Golf Course, a crime that might otherwise be a misdemeanor was prosecuted as Ewing's third serious felony. Ewing was sentenced to life in prison, with no parole for 25 years. In July of 2001, the California Supreme Court refused to hear his appeal. Ewing, an AIDS victim who may be nearing death, will be eligible for parole when he is 62.

Among other things, Ewing's attorney will argue that the sentence violates the constitutional ban against double jeopardy — punishing a person twice for the same crime. In essence, Denvir will say, Ewing is being punished, not for the golf-club thefts, but for his previous offenses.

"We agree you can enhance his sentence because of his prior record, but this is excessive," Denvir said. "No matter what he did in the past ... no shoplifter deserves to get 25 years to life in prison."

Mauer, of The Sentencing Project, says that in cases such as Ewing's, the three-strikes law is doing more harm than good.

Prosecutors "will argue that this man has demonstrated he is a repeat offender and we need to lock him up to prevent future offenses," Mauer said. "If [Ewing's] third strike was for raping a stranger, that argument might hold up. But when the third strike is a low-level property offense, we're talking about an enormous amount of money and prison time locking him up, with no guarantee this is the most effective way to deal with crime."

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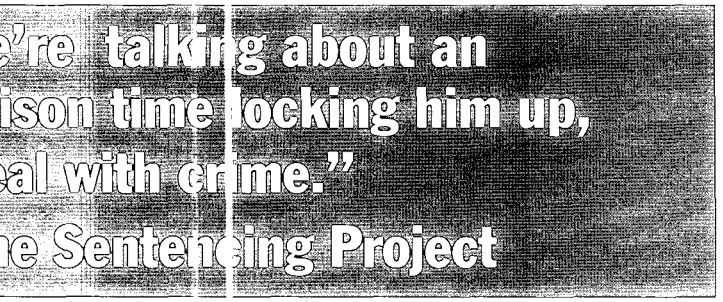


In briefs submitted to the Supreme Court, prosecutors argue that Ewing's sentence is not overly harsh in light of his long record of crime. They also contend that the Eighth Amendment permits heavier penalties on habitual offenders and that the California law lets courts reduce lesser felonies to misdemeanors so redeemable defendants can avoid three-strikes sentences.

"Three-strikers have earned their long sentences because they are the most thick-skulled and predictably wicked of felons," wrote the California District Attorneys' Association in a separate brief before the court. "They hurt people, they hurt communities, and they hurt our economy. What remains but to remove them from us for long periods of time?"

The state prosecutor arguing against Ewing, Donald E. DeNicola, would not comment on the case. Nor would Douglas Danzig, the attorney representing the state in the case of Andrade.

Andrade walked into an Ontario K-Mart in November of 1995 and stuffed $84.70 worth of children's videos into his pants — "Casper," "Snow White," and "Batman Forever" among them. After store detectives stopped him, Andrade was arrested, charged and freed on bail. Two weeks later, he tried to walk out of a Montclair K-Mart with another $68.84 in videos. He was charged again.

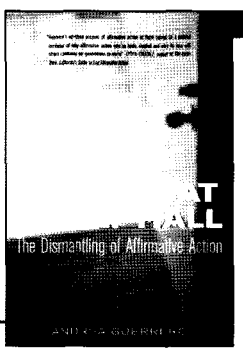
Prosecutors say Andrade, now 44, was a heroin user who repeatedly stole to support his habit. His past record — three separate prison terms for crimes that included residential burglary — allowed his video thefts to be upgraded from misdemeanors to felonies, which qualified them as third "strikes." Today, Andrade is serving a 50-year-to-life sentence at Lancaster State Prison. He is eligible for parole when he is 87.

Last November, a divided 9th Circuit Court of Appeals overturned Andrade's sentence on the grounds it was cruel and unusual. It is that ruling that California state Attorney General Bill Lockyer is appealing to the U.S. Supreme Court.

Andrade's attorney characterizes his client as an Army veteran who had been crime-free nearly 12 years when he fell "off the wagon." In briefs submitted to the court, he argues that Andrade's life sentence — with no possibility of parole for 50 years — is a "grossly excessive" punishment for shoplifting $153 worth of tapes.

"The Supreme Court, for almost a century, has said

California Policies, National Implications



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that grossly disproportionate penalties violate the Eighth Amendment," said Erwin Chemerinsky, Andrade's attorney and a University of Southern California law professor. "While there's deference to the states, there's not total deference."

"Grossly disproportionate" is a term that will come up often during the Supreme Court arguments. Denvir and Chemerinsky will point to prior rulings in which the justices struck down sentences they felt were far too harsh for the crime or the criminal. Danzig and DeNicola will argue that the court has repeatedly ruled that states have broad discretion to define crime and to punish it.

As for the justices, they will likely focus on two of the high court's most recent ruling in major cases involving the Eighth Amendment.

In the 1991 case of *Harmelin v. Michigan,* the court ruled that giving a life sentence to a man for possessing more than 650 grams of cocaine was not cruel and unusual. It was up to Michigan, the court said, to decide how to punish offenders.

Prosecutors will talk at length about *Harmelin* and three other rulings: The case of *Rummel v. Estelle,* in which the court wrote that the power to define and punish crimes is "purely a matter of legislative prerogative"; the case of *Hutto v. Davis,* in which the court wrote that federal courts should be "reluctant to review legislatively mandated terms of imprisonment;" and the case of *Solem v. Helm,* where the court ruled that federal courts should "grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits for crimes."

The defense attorneys will focus on a ruling the Supreme Court made just last year. In the case of *Atkins v. Virginia,* the court wrote that imposing the death penalty on the mentally retarded violated the Eighth Amendment. In that case, the justices said there are limits to a state's discretion.

Denvir and Chemerinsky will also refer to a 1983 case in which the high court ruled that a South Dakota court violated the Eighth Amendment for sentencing to life without the possibility of parole a seven-time nonviolent recidivist who had written a $100 check that bounced.

Some of the justices have already indicated their distaste for California's three-strikes law. In the 1999 case of a California life-term inmate whose third strike was for stealing a bottle of vitamins, the high court denied review. But Justice Stephen Breyer, who wanted to grant a hearing, suggested that California's law might be going too far. Three other justices — John Paul Stevens, David Souter and Ruth Bader Ginsburg — agreed with him.

Supreme Court scholars agree that as the justices review the three strikes cases, the conservatives on the court — Chief Justice William Rehnquist and Justice Antonin Scalia — are likely to take the view of the majority in the *Harmelin* case. Justice Clarence Thomas is believed to share that view as well. They say the court's moderate-to-liberal justices — Stevens, Ginsburg, Souter and Breyer — are likely to take the view of the majority in *Atkins v. Virginia.* Justices Anthony Kennedy and Sandra Day O'Connor are likely to be the swing votes.

"It's those two justices you look to, and you say, 'Are they going to vote with the liberals as they did [in the Atkins case] and say [this is] cruel and unusual?' " said Tim Lynch, a Supreme Court scholar at the Cato Institute, a D.C. think tank. "Or, are they going to vote with the conservatives who, in the *Harmelin* case, said, 'Look, everyone has their own view as to what's a harsh sentence?'"

Many observers believe that a ruling that favors Andrade and Ewing might affect the 344 men and women in California serving sentences for third strikes that involved petty theft. The California Department of Corrections stands ready to submit the names of those inmates to the state Attorney General's Office if the law is found to be unconstitutional.

"We will ask [the attorney general,] 'What do you want us to do with these people?' " said Russ Heimerich, a corrections spokesman.

Gregg McClain, a San Diego County deputy district attorney who has prosecuted many three-strikes cases, said that because so few of these cases have reached higher courts, the law appears to be working well.

"Overall, the law is being applied as the public wants it [to be]," McClain said. "And in what appears to be a manner that is judicially acceptable."

Contributing Editor Dana Wilke is a Washington D. C. correspondent for Copley News Service. Comments on this article may be sent to **edit@statenet.com.**

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Hahn and Bratton

by Sherry Bebitch Jeffe

It's early morning, October 3, 2002. A local Los Angeles news anchor is reading a report on Hurricane Lili. But the photo displayed over her shoulder is a headshot of William J. Bratton, soon to be announced as Mayor James K. Hahn's choice to head the Los Angeles Police Department. The juxtaposition of these images may be apt.

Bratton, self-styled "America's Top Cop," campaigned for the chief's job with the same focus, energy and ego that he used to attack rampant street crime during his 27-month tenure as New York City's police commissioner. He succeeded in curbing New York crime. And he was equally successful in nabbing the L.A. chief's position — despite the fact that, as Hahn's selection process unfolded, the skills Bratton used to attain both goals were thought by some to work against his appointment.

In personality and leadership style, Bratton and Hahn are polar opposites. Bratton has been variously portrayed as "a showboat," "charismatic," "a high-wattage personality" and a "press-friendly Runyonesque persona." These are words that have never been used to describe Hahn, who generally avoids the media limelight.

Bratton's penchant for publicity — which one journalist labeled "Bill Bratton's Viagra" — landed the commissioner in hot water with his former boss, then-New York Mayor Rudy Guiliani (no media slouch himself). Word was that Guiliani's nervousness about a possible Bratton challenge contributed to the commissioner's forced resignation in 1996.

When Hahn introduced Bratton to the L.A. press, the chief-designate responded with what one reporter described as "off-the-cuff eloquence," in stark contrast to Hahn, who stolidly read his remarks from cards. That Hahn, the farthest thing in politics from a publicity hound, has enthusiastically embraced this Gotham media darling tells Angelenos a lot about the mayor.

Yes, Hahn has a low-key public persona, but his decision to deny former Los Angeles Police Chief Bernard C. Parks a second term and the choice of Bratton to replace Parks have shown Hahn to be a risk-taker. His pick also shows a real commitment to shake up the city's beleaguered police department.

In his 16 years as L.A. city attorney, Hahn got to know intimately the problems of the LAPD; he helped negotiate the terms of a federal consent decree mandated in the wake of the Rampart police corruption scandal, and worked with Bratton, an outside monitor, to oversee its reforms.

Hahn knows that he will be judged on his chief's performance and calls his choice his most important decision in office. Hahn was around for the 1991 Rodney King beating and its aftermath and he learned from what he observed; he doesn't want a replay of the animosity that paralyzed then-Mayor Tom Bradley and Police Chief Daryl Gates. In the post-verdict riots, Hahn saw what the political and social costs could be when there is little trust or communication between the mayor and his chief. The need for compatibility no doubt influenced Hahn's decision to fire Parks, despite the political hit the mayor took in the African-American community.

Hahn, it seems, is comfortable enough in his own skin to reach out to the cop who outshone "America's mayor."

Hahn, it seems, is comfortable enough in his own skin to reach out to the cop who outshone "America's mayor." Hahn has long been familiar with media-savvy pols and doesn't seem to be intimidated by them. He grew up around a public relations genius.

The mayor's father, the late L.A. County Supervisor Kenneth Hahn, was as outgoing as Bratton, and also gloried in the spotlight. Legend has it that Supervisor Hahn once advised a political neophyte always to place his hand on the plaque or proclamation being presented, so that the politician couldn't be cropped out of the ceremonial photograph — since that would leave a disembodied hand.

Bratton, too, has been known to offer political advice. In his autobiography, "Turnaround," he quotes Teddy Roosevelt: "The best executive is the one who has sense enough to pick good men to do what he wants done, and self-restraint enough to keep from meddling with them while they do it."

That is a philosophy on which Bratton and Hahn appear to agree. It is also one whose implementation could determine the success — or failure — of each man in the public arena.

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How to choose a doctor

In California's chaotic health care market, the process of choosing a doctor or medical group can resemble a blind date, with consumers scrambling to find something — *anything* — to indicate whether they have entrusted their care to Dr. Jekyll or Mr. Hyde.

That is about to change under legislation signed by Governor Gray Davis in September. For the first time, California patients will be able to check on the Internet to see whether their doctor has exceeded a threshold for malpractice settlements.

It's only a small part of what the proponents originally sought. And in a stiff battle with the medical industry, patient advocates also failed this year to pass another public disclosure bill that would warn consumers about financially troubled medical groups. But after years of high-stakes battles, the latest change still marks a major shift in public disclosure of physician performance in California.

A nine-year battle to win more public disclosure of doctor performance records won a victory this year with a landmark bill to post malpractice settlements on the Internet. Consumer advocates want more, but the powerful medical industry says good doctors may be tainted by frivolous suits.

By Stephen Robitaille

Insurance groups, hospitals and "every other health care industry stakeholder [have] malpractice information [about doctors] before they make intelligent decisions," said Senator Liz Figueroa (D-Fremont), author of the malpractice disclosure legislation, SB 1950. "The one group that could actually die — patients — doesn't have this information."

Opponents of the bill from the medical industry contend the best way to avoid Mr. Hyde doctors is to beef up the notoriously ineffective malpractice investigations conducted by the state Medical Board. They said the new public disclosure law will still leave consumers uninformed because malpractice settlements in today's lawsuit-happy society are a poor measure of physician performance.

"We don't believe that there's any kind of solid relationship between the quality of a physician's practice and the settlement of professional liability claims," said John Whitelaw, president of the California Medical Association and an obstetrician-gynecologist with Sutter Health in Sacramento. "We also know that there is a threshold at which it becomes less expensive in terms of time and money and stress on the physician to settle lawsuits that in our mind are without merit.

"In my practice, I fought my first two malpractice cases in court and won them both, but it was incredibly draining," said Whitelaw. "The third time, when I was the fourth listed plaintiff in a suit for a patient I had seen once but never treated and I had the chance to settle for $14,000, I said, 'Where do I sign?' "

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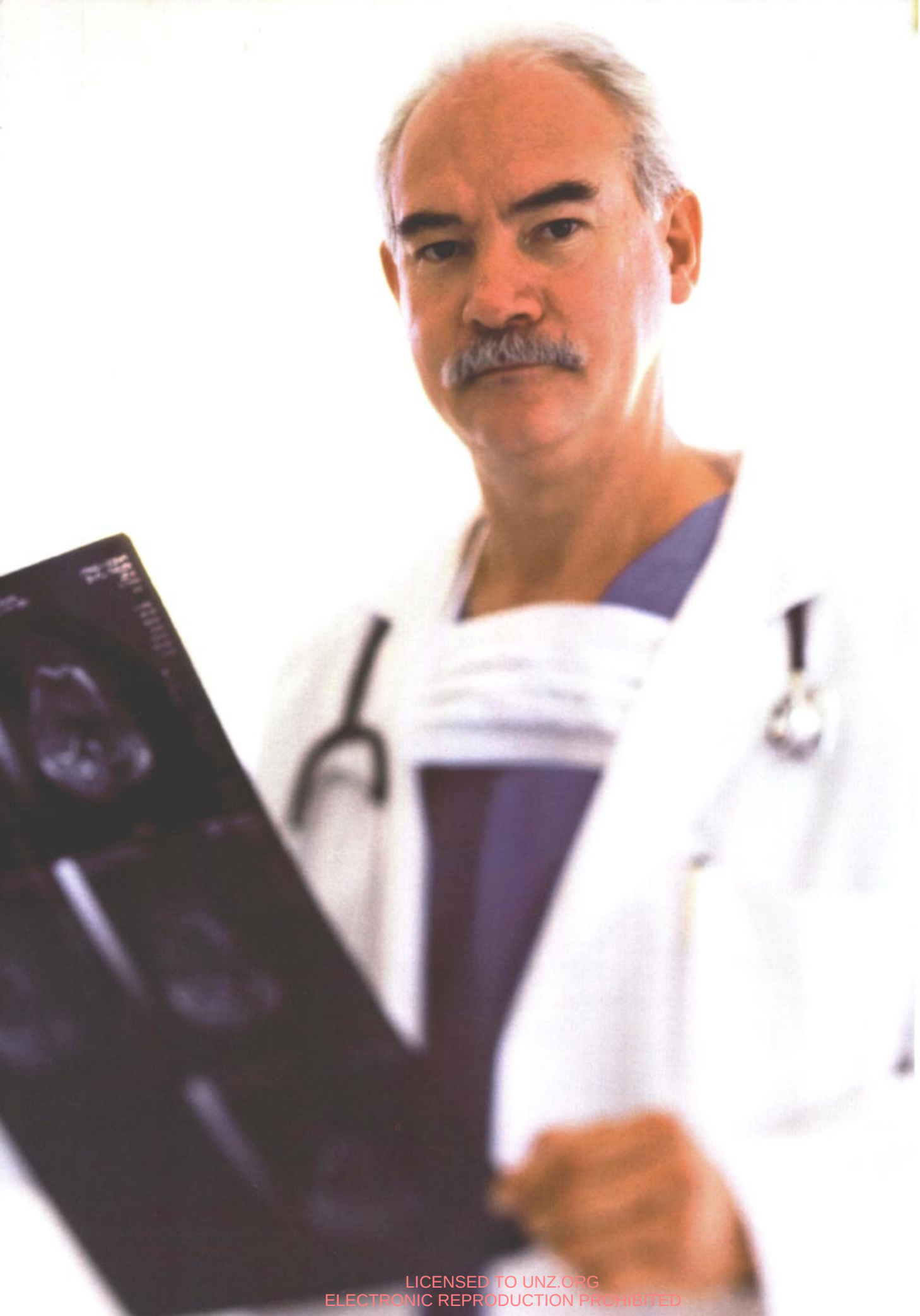

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"The one group that could actually die — patients — doesn't have this information."
— Senator Liz Figueroa

Patient advocates, however, have long considered settlements a key element of public disclosure, as malpractice lawsuits are far more likely to be resolved in an out-of-court settlements than at trial. For example, the Medical Board logged 921 settlements in the 2001 fiscal year, but only 416 cases were decided by juries or arbitrators.

National trend

California's new law mirrors a growing national demand for greater disclosure, with 15 states since 1996 implementing laws allowing public posting of information on physicians, with varying levels of comprehensiveness.

Figueroa's legislation is the culmination of a public disclosure push in California that began in 1993 after a series of embarrassing revelations about the state Medical Board, the agency that licenses and disciplines California doctors.

This spring, the *Orange County Register* reported that the Medical Board investigated only a small portion of the complaints filed against physicians and that bad doctors were allowed to continue practicing while investigations languished, often with tragic results for patients. A lack of public disclosure about physician performance figured prominently in the newspaper's revelations, which marked the third major public embarrassment of this type for the Medical Board in the past 12 years.

SB 1950 gained impetus from the newspaper revelations. Early drafts of the bill, supported by consumer advocates and the state Medical Board itself, called for public release of all malpractice settlements of $30,000 or more, all misdemeanor convictions related to the practice of medicine, and completed board investigations that had been sent to the state Attorney General's Office for prosecution.

After multiple rounds of negotiations, however, the bill's final version softened the malpractice section and dropped the disclosure requirement for both misdemeanor convictions and completed investigations. The CMA ultimately remained neutral on the bill, while malpractice insurers opposed SB 1950 to the end.

Under the new bill, settlements of $30,000 or more will be posted only if physicians in low-risk practices have three or more malpractice settlements in a 10-year period. For those in high-risk specialties, who typically receive more lawsuits, the threshold for public disclosure is four settlements in the same time frame. The Medical Board has until next July to decide which specialties fall into high- or low-risk categories.

The Medical Board already discloses malpractice judgments and arbitration awards, felony convictions, and permanent revocations of doctors' medical privileges by hospitals.

In another key change won by the medical industry, a physician's public record will be wiped clean 10 years after the date of the oldest settlement, if there are no more settlements or judgments in that time. The postings also will not identify the specific amount of any malpractice settlements. Instead, the amount will be categorized as average, above average, or above average for similar settlements. Language explaining how to interpret malpractice information will also be posted with the disclosures on the web site for the state medical board (www.medbd.ca.gov).

Finally, the legislation cracks down on the Medical Board by adding two members of the public to its oversight panel and establishing a special monitor to review board operations and report to the Legislature. It also orders that the board give priority to investigations involving patient

Medical Board of California: A Public Disclosure Chronology

1989

Center for Public Interest Law at the University of San Diego castigates the Board of Medical Quality Assurance, saying the "moribund" agency coddles doctors, has a backlog of cases considered an immediate threat to public health. (At this time, board responsible for maintaining malpractice lawsuit judgment and settlement information, but does not make any of the information public).

1990

SB 2375 beefs up reporting to the Medical Board. County coroners report deaths caused by alleged malpractice; prosecutors report felony charges against physicians; and county court clerks report convictions.

1992

State investigation finds 300 complaints against doctors were purged from files. "60 Minutes" television program highlights a doctor serving murder sentence with a clean record at the medical board. Revelations prompt new calls for increased public disclosure of physician performance records.

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deaths or permanent injuries.

The new rules take effect in January, but consumers may have to wait for years before doctors begin to hit the threshold for posting their settlements.

"The earlier version of the bill is the best version, from our perspective, but that was before CMA got its hands on it," said Julianne D'Angelo Fellmeth, administrative director of the Center for Public Interest Law at the University of San Diego, a public-interest law center that monitors state regulatory agencies. "I knew that in the give-and-take process in the Legislature, we had to be sure we had things that could get through."

Hard-fought debate

California's public disclosure debate has been hard-fought and often anguished.

Politically, it pits consumer advocates against the financial might of the California Medical Association, which represents roughly 35,000 of the state's 112,000 licensed physicians. CMA gave $1.3 million in campaign donations in the 2000 election cycle and spent another $1.4 million for lobbying efforts. SB 1950 also divided lawmakers between compelling arguments mounted by both sides.

Insurance industry statistics support CMA's claim that malpractice lawsuits are far cheaper to settle than to fight, even though doctors do very well in cases that go to trial, according to data from the Physician Insurers Association of America, a national trade association.

In out-of-court settlements nationwide, the average patient award in 2001 was $165,300, and the average total expense per case was $22,700 — but those totals jumped to $293,175 and $59,000, respectively, in cases that went to trial. In total, 93 percent of all suits were settled out of court, withdrawn or dropped, while only 7 percent went to trial. However, the association found that 82 percent of all trial verdicts go to doctors, not patients.

Doctors in some high-risk specialties are also far more likely to be sued than others, according to data from The Doctors Company, the nation's largest physician-owned malpractice insurer. For example, a 1997 report said that some high-risk specialists, such as colorectal surgeons, are roughly five times as likely to be sued as internists.

CMA President Whitelaw said the new blast of controversial publicity surrounding the California Medical Board, coupled with a general rise in consumer demand for such information, made SB 1950's passage inevitable.

"Physicians and the CMA are never going to be in a position to support disclosure of any kind, given the reasons why lawsuits get filed and lawsuits get settled," said Whitelaw. "We don't believe that there is any information that will be useful, other than confusing the issue and making good reading in the newspapers."

On the other side of the debate, however, disclosure proponents contend that the public is entitled to know the records of the doctors to whom they entrust their medical care, especially when regulators fail to do their job. They point to physicians like Richard M. Escajeda, as an example of the need for a full public accounting of doctor disciplinary records.

Escajeda, a San Diego plastic surgeon, has been sued by patients 16 times since 1980 and has resolved at least eight of them in confidential, out-of-court settlements, according to a *California Journal* review of public records in San Diego County Superior Court. Escajeda prevailed in five cases, while records for two cases were incomplete or missing, and one suit is still pending.

Escajeda's out-of-court settlements include an accusation that he blinded a patient in one eye during a 2000 scar repair procedure; a patient who allegedly lost mobility of his leg after a cosmetic calf implant in 1998; and a woman who said he operated in 1998 on her left breast when she only authorized him to operate on her right.

Escajeda was also placed on Medical Board probation between 1992 and 1997, after pleading no contest to allegations of inappropriate sexual contact with anesthetized patients; unlicensed office staff administering anesthesia; and reusing disposable needles, syringes, sutures

1993

SB 916 expands public disclosure, listing for the first time malpractice judgments and arbitration awards over $30,000, felony convictions of physicians, completed board investigations that had been sent to the Attorney General's office for prosecution, and disciplinary actions by regulatory agencies in other states. Calif. Medical Assn. files suit to block the disclosure, succeeds in removing completed board investigations.

1997

AB 103 requires Medical Board to post all public information on its Web site, removes the $30,000 threshold for listing of malpractice judgments and arbitration awards, and for the first time includes permanent disciplinary actions by hospitals against doctors. Disclosure of malpractice settlements and other issues deleted from bill after CMA opposition.

2002

SB 1950 for the first time requires public disclosure of malpractice settlements over $30,000, if a doctor has three or four settlements in a 10-year period, depending on the specialty.

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SB 1950: Before and After

Comparison of SB 1950 as it was introduced and as it was signed into law by Governor Gray Davis.

Before

- Public posting of:
  - Malpractice settlements over $30,000. Settlement amount described as below average, average, or above average.
  - Misdemeanor convictions related to practice of medicine
  - Board investigations sent to state Atty. Gen. Office for prosecution
- Adds two members of public to the board
- Establish special agency monitor, who reports to the Legislature

After

- Public posting of:
  - Malpracticie settlements over $30,000, only if physicians have three to four settlements in a 10-year period, depending on specialty. Public records will be expunged if there are no more settlements or judgments in the period. Settlement amount described as below average, average, or above average.
- Adds two members of public to the board
- Establish special agency monitor, who reports to the Legislature
- Prioritizes board investigations by severity of complaint

and leftover intravenous solution.

Escajeda's 31-page probation report is available to the public, but the Medical Board record will not list any of the lawsuit settlements because they were filed prior to the recent legislation. Still, those records are on public file with the courts.

Since Escajeda settled five lawsuits between 1997 and 2002, the new legislation would require that they be posted on the Medical Board's Web site, as long as enough of them were over $30,000 to require public disclosure. Specifics of the lawsuits, which are contained in court records, will not be publicly posted by the Medical Board.

Escajeda practices in a high-risk specialty. Plastic surgeons that perform implant procedures are sued five times as often as internists, according to The Doctors Company report. But Medical Board probation is rare. Of the nearly 11,000 complaints filed against doctors with the Medical Board in the 2001 fiscal year, less than 1 percent resulted in probation.

Disclosure proponents contend that examples such as this are a big reason why public release of information on physicians is necessary for patients to protect themselves.

"When you get your car repaired, there is a sign in the shop with an 800 number that shows where you can go if there's a problem," said a former Escajeda patient, who is barred by terms of an out-of-court settlement from naming him publicly. "How about a little pamphlet in doctors' offices, required by law, which explains all that [to patients]? I know more about the guy who fixes my brakes than I do about the physician who operated on me."

When asked if Escajeda were under Medical Board investigation, board spokesperson Candis Cohen declined to comment directly on questions of board investigations, stating, "We are aware of the matter and are proceeding appropriately."

Escajeda did not respond to telephone and e-mail requests for comment.

Medical group disclosure

When compared to malpractice, this year's unsuccessful bill regarding public disclosure about the fiscal solvency of medical groups can seem an arcane issue of patient safety. But consumer advocates warn that a financially-strapped medical group is a higher risk for making health-care decisions based on cost, not a patient's need.

"Patients and doctors deserve an early-warning system to know how groups are performing, to protect their health and their interest," said Daniel Zingale, director of the state Department of Managed Health Care. "It's important because finances affect patient care. If an HMO or a medical group is not paying bills on time, that's a warning sign for patients. We know that the groups that don't pay their doctors reliably end up sacrificing quality health care or, in the worst-case scenario, file for bankruptcy."

In California, most of the state's 365 medical groups are to varying degrees nearly as important as HMOs in deciding what medical care patients will be allowed to receive. That's because of the nature of HMO-medical group contracts in California, many of which employ a device called delegated risk, in which the medical group — and not the HMO — takes on much of the financial risk of patient care and is in charge of deciding what treatments patients may or may not receive.

Accepting those contracts has proved risky in California's punishing managed care market, as roughly 70 medical groups since mid-1999 have declared bankruptcy or closed due to financial pressures. Physicians and health plans have long squabbled over the causes, with doctors blaming miserly payments from HMOs and plans pointing to a competitive market and poor medical group management.

Patients of fiscally unstable or bankrupt medical groups can quickly find themselves in an unsettling netherworld of health-care politics. Faltering medical groups have delayed or denied medical care to save money, while bankruptcies have created nightmares for patients and providers, with medical records disappearing, and unpaid specialists and laboratories illegally attempting to collect for

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services direct y from patients.

"They are taking on this financial risk . . . and no one is accountable," said Marjorie Swartz, a legislative advocate for the Western Center on Law and Poverty, which has pushed for public disclosure of medical group solvency. "There are delays in referrals, delays in treatment, there's no regulation and there's no way to know what's going on."

Last year, under a new state law, the Department of Managed Health Care publicly released four standardized fiscal indicators for the state's medical groups. The indicators showed whether medical groups process at least 95 percent of their claims within 45 working days and whether they are finar cially solvent.

The data showed that only 44 percent of the state's medical groups passed all four measures.

CMA opposed the disclosure because it contends that release of fiscal information placed medical groups at a competitive disadvantage in their negotiations with HMOs. It sued to halt the data's public release and earlier this year it won a Superior Court ruling that not only removed the data from public view but barred the state from even collecting it.

"If a medical group is required to bare its entire fiscal reality, as if all of us were required to publish our IRS tax returns, then those groups would be vulnerable to the various health plans with whom they contract," said Jack Lewin, CMA's executive director. "What happens now is when a health plan senses that a medical group is somehow in the black, then in the next round of contract negotiations they can cut back on reimbursements or hold onto existing rates, thereby improving their profits. That is unacceptable."

Assemblywoman Christine Kehoe (D-San Diego) authored AB 584 this year in a bid to restore the public disclosure of medical group finances. But CMA, with a favorable court ruling in its pocket, was in no hurry to compromise. Legislators, wearied by negotiations over the previous state law, threw up their hands and the bill died.

Proponents of the legislation are not giving up, though. State officials are considering a new regulatory method for requiring the release of the information, one that addresses the court concerns. And some lawmakers contend the medical industry's opposition is less one of damaging public disclosure and more of doctor-versus-doctor financial wrangling.

At one point, they note, CMA proposed an amendment to AB684 that would have provided a medical group's full audited financial statement to HMOs — which would reveal far more information than the financial indicators it blocked in court. And while the financial information would have been available to HMOs, CMA balked at consumer advocates' proposals to release the same information to the public.

Lewin explained that CMA's proposal would have allowed an HMO to see only information related to its own contract with a medical group but no other health plan's. CMA feared that the release of a group's entire portfolio of contracts would lay bare its financial particulars for all HMOs to see.

Since the demise of AB 684, CMA and state officials have been negotiating a format under which the postings struck down by the court can again be released to the public.

CMA is proposing release of specific information on timely claims payments. For the other three measures, it wants a yes-no format to indicate whether a group is meeting the requirements, a numerical ranking showing a group's relative level of compliance, and an indication of whether a group has been improving or falling behind.

State officials want to reinstate full release of all four measures. They say the information can be posted in such a way that health plans cannot get information that will harm medical groups.

CMA's Lewin said he hoped for a mutual agreement that would eliminate any need to return to court. And DMHC's Zingale suggested that the disclosure will be restored, one way or another.

"We're more optimistic that these regulations could withstand a court challenge," said Zingale. "We would like to see CMA be supportive, but we do feel we need to move forward on this."

Stephen Robitaille is a freelance writer in Oakland and a former reporter at the San Jose Mercury News. *Comments can be sent to* **edit@statenet.com.**

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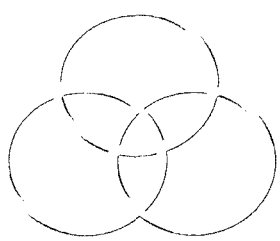

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Different drummers

"If you're going to San Francisco, be sure to wear a flower in your hair."

Thirty-five years after John Phillips wrote those lyrics in what would become an anthem to the anti-war movement, the Bay Area and its representatives remain on the front lines opposing Washington's inexorable march toward war.

There are other liberal enclaves around the nation — Los Angeles and New York, to name two. But no place in America rivals Northern California for its anti-war sentiment. As the Democratic Party has struggled recently to find its voice on Iraq, Bay Area representatives spoke with unwavering clarity.

No place in America rivals Northern California for its anti-war sentiment.

Congress, rushing to act before the elections, provided President Bush an overwhelming endorsement of his Iraq war plans. Support came from both parties, across political spectrums and from every region of the country. Except the Bay Area.

Ten of the 12 House members who represent the Bay Area region voted against Bush's war resolution. Elsewhere, many Democrats worried about whether they would pay a political price for voting against the president. But in Northern California, most House members are likely to gain politically from their opposition. The Northern Californians who took the biggest political risks are Democratic Reps. Tom Lantos of San Mateo and Ellen Tauscher of Walnut Creek, both of whom dared to back Bush.

It would be easy to dismiss Northern California's opposition, as some analysts have done, as the knee-jerk reaction of aged flower children. Rep. Pete Stark, after all, placed an enormous peace sign atop the Walnut Creek bank he founded as well as peace symbols on customers checks before he was elected to Congress in 1972. Oakland's Rep. Barbara Lee cut her political teeth as a staff aide to former Rep. Ron Dellums, perhaps the Capitol's most prominent peace activist.

Yet the Bay Area delegation, though Democratic and mostly liberal through and through, is hardly made up of flower children. All but Lee voted in favor of military action in Afghanistan.

Rep. Mike Thompson, about the time that Phillips' San Francisco ballad could be heard in the Haight, was serving as a platoon leader with the 173rd Airborne Brigade, where his heroism earned him a Purple Heart. Now a representative from Napa, Thompson created a stir last month when he and two fellow Democrats visited Baghdad. His travel companions went on national television to criticize Bush's approach, and all three were excoriated as "traitors" by some conservative talk-show hosts.

"The first time I was criticized for going overseas, I was a 19-year old Army airborne soldier, returning from Vietnam," Thompson wrote in a pointed defense of his patriotism on the Washington Post's op-ed page.

Recalling the anti-war protesters who tried to tip his bus, which carried wounded soldiers from Travis Air Force Base to San Francisco's Presidio, Thompson wrote that: "Elected officials in Washington had sent me halfway around the world to a place most of them had never seen to fight a war most Americans did not understand."

Thirty years later, as one of the officials who must now decide whether to send the next generation to war, Thompson said he felt compelled to get a feel for Iraq and be certain that attack was the only option.

Thompson has no problem taking out Saddam Hussein. He, like almost every other member of the Bay Area delegation, would have voted for a resolution that called on the United Nations to enforce its Iraq resolutions by force. He would support a U.S. attack if he believed the White House claim that Iraq poses an imminent threat.

The same could be said for every member of the Bay Area delegation. The fundamental divide in Washington is not between hawks and doves, but between those who think war must proceed promptly and those who believe there is time to build a broader base of international support.

So what is it about the Bay Area that compels tough vets like Thompson or mainstream Democrats like Lofgren to buck their majority leader Dick Gephardt, stand up to the president, and reject the Pentagon's analysis?

There is the tradition of tolerance and embrace of free spirit that dates back to the 1840s. There are the universities, the high number of renters and young transplants. There is also the 3,000 miles that separate the Bay Area from the tragedies of Sept. 11.

Head in the sand or ahead of their times, "for those who come to San Francisco," so goes the song, "summertime will be a love-in there."

Contributing Editor Marc Sandalow is Washington bureau chief for the San Francisco Chronicle. *Comments may be sent to* **edit@statenet.com.**

by Marc Sandalow

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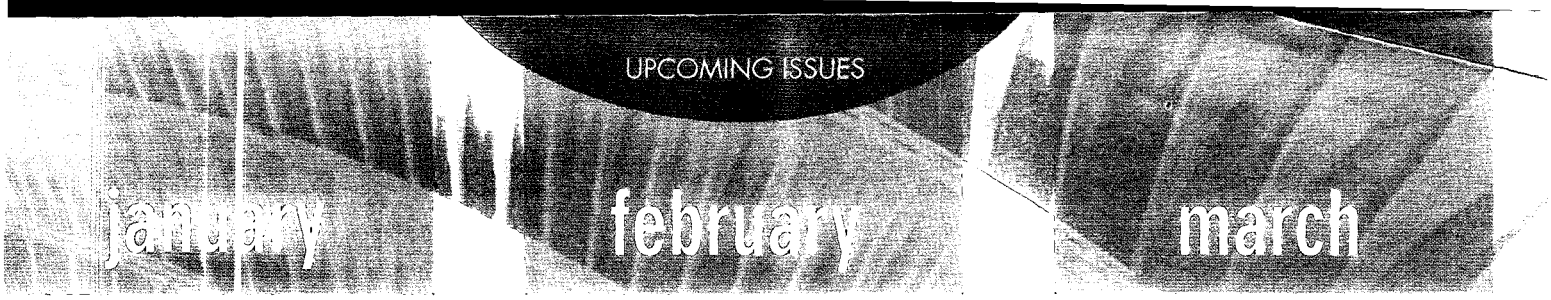

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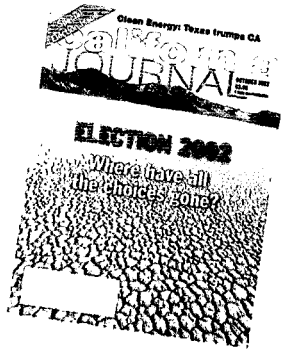

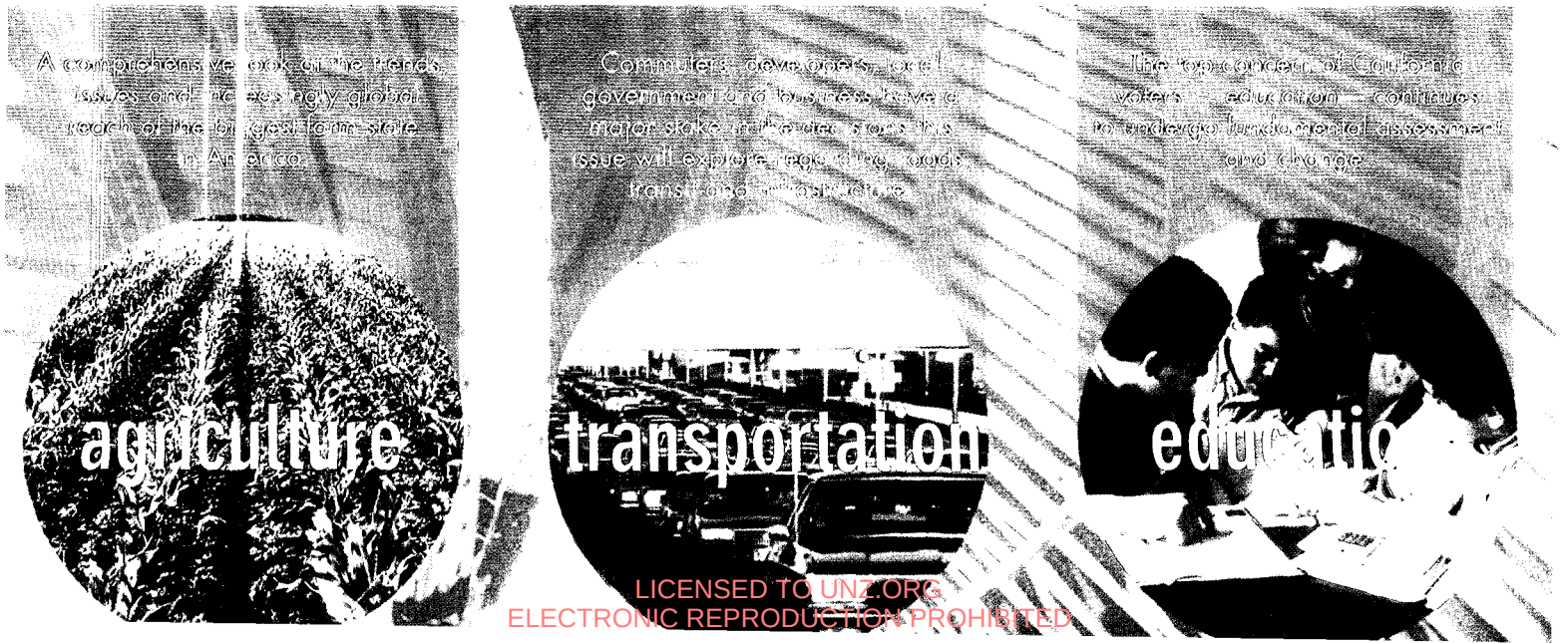
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